(11)

No. 02-1348 Status: ARGUED
Title: Olympic Airways, Petitioner
v.
Rubina Husain, Individually, and as Personal Representative of the Estate of Abid M. Hanson, Deceased, et al.
Docketed: March 14, 2003
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (00-14509)
Decision Date: December 12, 2002

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Mar 10 2003	Application (02A751) to recall and stay, submitted to Justice O'Connor.
Mar 11 2003	Application (02A751) granted by Justice O'Connor pending receipt of response and further order. (Response due by close of business March 18, 2003)
Mar 12 2003	Petition for writ of certiorari filed. (Response due April 14, 2003)
Mar 18 2003	Response to application (02A751) filed by Rubina Husain, et al. filed.
Mar 19 2003	(02A751) Reply in support of application filed by Olympic Airways.
Mar 19 2003	Application (02A751) granted by Justice O'Connor.
Apr 11 2003	Brief of respondents Rubina Husain, Individually, and as Personal Representative of the Estate of Abid M. Hanson, Deceased, et al. in opposition filed.
Apr 25 2003	Reply of petitioner Olympic Airways filed.
May 27 2003	Petition GRANTED Justice Breyer took no part in the consideration or decision of this petition.
Jul 9 2003	Joint appendix filed.
Jul 11 2003	Brief of petitioner Olympic Airways filed.
Jul 11 2003	Brief amicus curiae of Air Transport Association of America, Inc. filed.
Jul 24 2003	Extension of time within which to file respondents' brief on the merits to and including August 29, 2003.
Aug 19 2003	CIRCULATED.
Aug 19 2003	SET FOR ARGUMENT Wednesday November 12, 2003.
Aug 29 2003	Brief of respondents Rubina Husain, Individually, and as Personal Representative of the Estate of Abid M. Hanson, Deceased, et al. in opposition filed.
Aug 29 2003	Brief amicus curiae of the United States filed.
Sep 8 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 12 2003	Record received from the U.S.D.C. for the Northern Dist. of California. (2 boxes)
Oct 1 2003	Reply of petitioner Olympic Airways filed.
Oct 1 2003	Record received from the U.S.C.A. for the Ninth Circuit. (1 envelope)
Oct 3 2003	Motion of amicus Air Transport Assn. of America, Inc.for leave to file reply to brief amicus curiae of the United States filed.
Oct 6 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Breyer took no part in the consideration or decision of this petition.
Oct 20 2003	Motion for leave to file reply to brief amicus curiae of the United States DENIED. Justice Breyer took no part in the consideration or decision of this motion.

Docket for 02-1348

Nov 12 2003 Argued. For Petitioner: Andrew J. Harakas. For Respondents: H. Bartow Farr, III; and Barbara B. McDowell, Assistant to the Solicitor General, Department of Justice, Washington, DC. Justice Breyer not participating.

Supreme Court, U.S.
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No. 02 1348

IN THE

Supreme Court of the United States

OLYMPIC AIRWAYS,

Petitioner,

—v.—

RUBINA HUSAIN, ET. AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "accident" condition precedent to air carrier liability for a passenger's death under Article 17 of the Warsaw Convention is satisfied when a passenger's pre-existing medical condition is aggravated by exposure to a normal condition in the aircraft cabin, even if the carrier's negligence were a link in the chain of causation? The Ninth Circuit's answer to this question in the affirmative directly conflicts with the Third and Eleventh Circuit decisions in *Abramson v. Japan Airlines, Co., Ltd.*, 739 F.2d 130 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985) and *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998), and is contrary to the Court's decision in *Air France v. Saks*, 470 U.S. 392 (1985).

PARTIES TO THE PROCEEDING

The following persons and entities were parties before the United States Court of Appeals for the Ninth Circuit:

1. Petitioner OLYMPIC AIRWAYS.

2. Respondents Rubina Husain, Hannah Husain, Sarah Husain, Isaac Husain and the Estate of Abid M. Hanson, M.D.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner OLYMPIC AIRWAYS is a foreign corporation organized and existing under the laws of the Hellenic Republic of Greece with the majority of its shares owned by the government of Greece. No parent or publicly held company owns 10% or more of the stock of petitioner OLYMPIC AIRWAYS.

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Petitioner OLYMPIC AIRWAYS ("OLYMPIC") respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on December 12, 2002.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is officially reported at 316 F.3d 829 (9th Cir. Dec. 12, 2002) and is reproduced in the Appendix hereto at A 1a-21a.[1] The Amended Findings of Fact and Conclusions of Law of the District Court is officially reported at 116 F. Supp. 2d 1121 (N.D. Cal. Oct. 3, 2000) (Breyer, J.) and is reproduced at A 32a-80a. The Supplemental Findings of Fact and Conclusions of Law of the District Court is unofficially reported at 2000 WL 1780264, No. C 99-1400 CRB (N.D. Cal. Nov. 28, 2000) and is reproduced at A 23a-31a.

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 12, 2002 and this Petition has been filed within 90 days of that date. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

The applicable treaty is the Convention for the Unification of Certain Rules Relating to International Trans-

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[1] References preceded by "A" refer to pages in the Appendix hereto.

portation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No 876 (1934) (*reprinted in* note following 49 U.S.C.A. § 40105 (1997) ("Warsaw Convention"). The pertinent provisions are set forth in the Appendix at A 81a-84a.

STATEMENT OF THE CASE

A. The Nature of the Case

This Petition involves the legal question of whether, as a matter of treaty law, a normal condition in the aircraft cabin, which aggravates a passenger's pre-existing medical condition, can meet the "accident" condition precedent to liability under Article 17 of the Warsaw Convention, even if crew negligence was a link in the chain of causation, a consideration that expressly falls under Article 20(1) of the Convention.

Plaintiffs Rubina Husain (individually and as personal representative of the estate of decedent), Hannah Husain, Sarah Husain and Isaac Husain [hereinafter "plaintiffs"] brought an action against OLYMPIC in California Superior Court for Alameda County to recover damages as a result of the death of Abid M. Hanson, M.D. [hereinafter the "decedent" or "Dr. Hanson"] on January 4, 1998 while on board OLYMPIC flight 417 from Athens, Greece to New York. A 3a. Plaintiffs alleged that Dr. Hanson died as a result of an asthma attack caused by exposure to ambient cigarette smoke in the passenger cabin of OLYMPIC flight 417. A 3a.

OLYMPIC timely removed the action to the United States District Court for the Northern District of California on March 23, 1999 under 28 U.S.C. § 1441. A 33a. The jurisdiction of the district court was based upon the Foreign Sovereign Immunities Act (28 U.S.C. § 1330)[2] and federal question (28 U.S.C. § 1331) under the Warsaw Convention, a treaty of the United States. A 33a. The jurisdiction of the Court of Appeals was based upon 28 U.S.C. § 1291.

It is undisputed that the liability of OLYMPIC is governed exclusively by the Warsaw Convention, as supplemented by the Montreal Agreement,[3] as decedent's death occurred during the course of "international transportation by air" within the meaning of Article 1 of the Convention. *See* Warsaw Convention, Article 1 (A 81a).[4] Article 17 of the Warsaw Convention creates air carrier liability for passenger injury or death if caused by an "accident" within the meaning of the Convention. *See Air France v. Saks*, 470 U.S. 392, 405-07 (1985). The Warsaw Convention, together with the Montreal Agreement, serves to limit an air carrier's liability under Article 17 for a passenger's bodily injury or death to the sum of $75,000, unless the death was proximately caused by the "wilful misconduct" of the air carrier within the meaning of Article 25 of the Convention, in which event the monetary limit on recoverable damages is not available to the carrier.

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[2] OLYMPIC is a "foreign state" within the meaning of the 28 U.S.C. § 1603 of the Foreign Sovereign Immunities Act, as the majority of its shares are owned by the government of Greece. A 33a, n.1.

[3] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302 (1966) ("Montreal Agreement"). Pursuant to the Montreal Agreement, air carriers, by special contract, voluntarily agreed to increase the limit of liability to $75,000 and to waive the defense of all necessary measures for passenger injury or death set forth in Article 20(1) (A 83a) of the Convention. *See Saks*, 470 U.S. at 406-07 (1985).

[4] Decedent was traveling pursuant to a ticket that provided for round-trip transportation by air, U.S.—Egypt—U.S.

B. Statement of the Relevant Facts

The following facts are based upon the Findings of Fact of the district court as adopted by the Court of Appeals (A 3a-9a) and are not disputed for purposes of this Petition.

Decedent's Pre-Existing Medical Condition. Decedent, Abid M. Hanson, M.D., was 52 years old at the time of his death. A 3a. For more than 20 years prior to his death, Dr. Hanson suffered from asthma for which he did not receive regular treatment. A 4a. Dr. Hanson also suffered from severe food allergies but the extent of which was unclear. A 4a-5a.

In the two years prior to his death, Dr. Hanson had suffered two medical emergencies that the record shows may have been caused by asthma or food allergies. A 5a. At trial, experts for both parties agreed that at least one of these episodes was likely caused by food-related allergies. A 5a. In light of his existing medical condition, Dr. Hanson carried an emergency kit containing epinephrine in the event of an allergic reaction to food. A 5a. In addition, Dr. Hanson regularly carried and used a Proventil/Albuterol inhaler to aid his breathing. A 4a.

The Trip to Cairo. In December 1997, Dr. Hanson and his family flew from San Francisco to Athens and Cairo for vacation. The trip involved a stop in New York where Dr. Hanson learned that OLYMPIC allowed smoking on international flights. A 5a. Dr. Hanson and his family asked for and were assigned seats in the non-smoking section. A 5a. The flight to Cairo was uneventful. A 6a.

The Incident on the Return Trip to New York. On January 4, 1998, Dr. Hanson began the return trip from Cairo to the United States via Athens. A 6a. Dr. Hanson was seated in the non-smoking section on the flight from

Cairo to Athens and did not experience any breathing problems. A 6a. During a three to four hour layover in Athens, however, Dr. Hanson began having problems breathing. A 6a. The airport waiting area was very smoky and Dr. Hanson used his inhaler. A 6a.

Upon boarding OLYMPIC flight 417 from Athens to New York, Dr. Hanson and his family noticed that Dr. Hanson was seated in non-smoking row 48 and that the smoking section began in row 51.[5] A 6a, n. 3. Ms. Husain, Dr. Hanson's wife, approached OLYMPIC flight attendant Maria Leptourgou, informed her that Dr. Hanson could not be near the smoking section, and asked Ms. Leptourgou to move Dr. Hanson to another non-smoking seat. A 6a. Ms. Leptourgou responded by telling Ms. Husain to "have a seat." A 6a. After all of the passengers were seated, but before take-off, Ms. Husain again approached Ms. Leptourgou and asked that she move Dr. Hanson to a different non-smoking seat, explaining that he was allergic to smoke. A 7a. Ms. Husain testified that Ms. Leptourgou replied that she could not transfer Dr. Hanson to another seat because the plane was "totally full," and that she was too busy at the moment to assist Dr. Hanson. A 7a. Discovery revealed that flight 417 had 11 unoccupied seats: 2 business class; 6 non-smoking economy class; and 3 smoking economy class. A 7a, n. 5.

Shortly after take-off, the passengers in the smoking section began to smoke and Dr. Hanson indicated to his wife that the smoke was bothering him. A 7a. Ms. Husain approached Ms. Leptourgou and told her that she needed to move Dr. Hanson for health reasons. A 7a. Ms. Leptourgou again explained that she could not move Dr.

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[5] The aircraft was a Boeing 747 with 426 seats in 56 rows. In economy class, rows 14-50 were in the non-smoking section and rows 51-56 were in the smoking section. A 6a, n. 3.

Hanson because the "plane is full," but that Ms. Husain could ask other passengers if they would switch seats with Dr. Hanson. A 7a. Ms. Husain then returned to her seat and took no further action. A 40a.

After the meal service, the smoking increased and Dr. Hanson's breathing problems worsened. A 8a. Dr. Hanson walked to the front of the cabin to get some fresh air. A 8a. Upon reaching the front of the cabin, Dr. Hanson asked for his epinephrine kit, which Ms. Husain retrieved and then administered a shot. A 8a. She then went to notify Dr. Umesh Sabharwal, an allergist and family friend who was traveling with Dr. Hanson and his family. A 8a. Dr. Sabharwal helped Dr. Hanson to the floor, administered another shot of epinephrine, then began performing CPR and also administered a shot of Bricanyl. A 8a. Despite the efforts of Dr. Sabharwal and other passengers who assisted, Dr. Hanson died. A 8a. No autopsy was performed to determine the direct cause of death. A 8a.

C. The Findings of Fact and Conclusions of Law of the District Court

Following the denial of OLYMPIC's motion for summary judgment, which argued that Dr. Hanson's death was not caused by an "accident," a precondition to liability under Article 17 of the Warsaw Convention, the case proceeded to trial.[6] At trial, plaintiffs argued that Dr. Hanson died from a severe asthma attack caused by inhaling second-hand smoke. OLYMPIC argued that Dr. Hanson's death was the result of an allergic reaction to food or some other medical problem unrelated to the

[6] The case was tried to the district court in accordance with the Foreign Sovereign Immunities Act, which provides only for non-jury civil actions. 28 U.S.C. §§ 1330(a), 1605. A 33a, n. 1.

smoke and, in any event, was not caused by an Article 17 "accident."

The district court issued its findings of fact and conclusions of law on August 28, 2000, as amended on October 3, 2000.[7] In analyzing the "accident" requirement of Article 17 of the Warsaw Convention, the district court specifically recognized that "the smoke in the cabin was not the 'unusual' or 'unexpected' event which caused Dr. Hanson's death, although . . . the smoke undoubtedly had a significant place in the causal chain." A 51a. In fact, while the district court found that smoke exposure during flight 417 was the primary cause of Dr. Hanson's death, the court held that Ms. Leptourgou's failure to accede to Ms. Husain's requests to reassign Dr. Hanson to another seat on the aircraft was an "accident" under Article 17 of the Warsaw Convention which proximately caused his death. A 59a-60a. The district court also found Dr. Hanson 50% at fault for his own death in that he failed to take any action to change his seat. A 78a. The district court then found Ms. Leptourgou's refusal to reassign Dr. Hanson to another non-smoking seat constituted "wilful misconduct" under Article 25 of the Warsaw Convention. A 67a.

The district court awarded plaintiffs $1,400,000, but reduced the award by 50% due to Dr. Hanson's comparative negligence. A 79a-80a. On November 28, 2000, the district court issued supplemental findings of fact and conclusions of law awarding plaintiffs an additional $1,400,000 (reduced to $700,000) in non-pecuniary damages. A 31a. Final judgment in the amount $1,400,000 was entered on November 28, 2000. A 22a. OLYMPIC timely appealed.

[7] The Amended Findings of Fact and Conclusions of Law only made technical corrections. All references herein are to the Amended Findings and Conclusions.

D. The Decision of the Court of Appeals Below

The Court of Appeals affirmed the district court's findings and conclusion that Dr. Hanson's death was caused by an Article 17 "accident."

Article 17 Accident. The Court of Appeals below found that the OLYMPIC flight attendant's (Ms. Leptourgou's) failure to move Dr. Hanson to a different non-smoking seat violated OLYMPIC's procedures and was an "accident" under Article 17 of the Warsaw Convention. A 14a. The Court below stated:

> Ms. Leptourgou's failure to act was more egregious in light of the simple nature of Ms. Husain's request, which could easily have been satisfied without interference with the airplane's normal operation. Combined, these factors bring Ms. Leptourgou's failure to assist Dr. Hanson within the meaning of an "accident" for Article 17 purposes. Her conduct was clearly external to Dr. Hanson, and it was unexpected and unusual in light of industry standards, Olympic policy, and the simple nature of Dr. Hanson's requested accommodation. The failure to act in the face of a known, serious risk satisfies the meaning of "accident" within Article 17 so long as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane.

A 14a.

Article 17 Causation. Although the Court below first recognized that for "a carrier to be liable for an injury, the passenger must prove the accident caused the injury," the Court held that the "accident need not be the sole cause of the injury," and that it is sufficient if it is any " 'link in the chain.' " A 16a. The Court then found

that "the exposure to smoke and failure to move Dr. Hanson is such a link." A 16a-17a.

Article 25 Wilful Misconduct. The Court of Appeals also affirmed the district court's finding that the death of Dr. Hanson was proximately caused by the wilful misconduct of OLYMPIC. The Court stated: "Ms. Leptourgou's failure to take action, either by moving Dr. Hanson or by notifying the chief cabin attendant of Ms. Husain's request to have her husband moved, was willful misconduct." A 19a.

REASONS FOR GRANTING THE WRIT

Article 17 of the Convention sets forth the conditions precedent to holding an air carrier liable for the death of a passenger. Article 17 provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the *accident which caused the damage* so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018 (emphasis added). Thus, carrier liability only arises if an "accident" caused the passenger injury or death.

Although the meaning of the term "accident" was addressed by the Court in *Air France v. Saks*, 470 U.S. 392 (1985), which involved an action against the carrier by a passenger who suffered an ear injury caused by normal cabin pressurization changes during landing, the lower courts are in conflict as to the proper application of Article 17 and the Court's rulings in *Saks*. In *Saks*, the Court defined an "accident" as "an unexpected or unusual event or happening that is external to the pas-

senger." *Id.* at 405. The Court made clear that "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply." *Id.* at 406. For this reason, although the "definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries," issues of crew negligence are not implicated or relevant because the "accident" inquiry focuses solely on the "nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury." 470 U.S. at 407 (emphasis in original).

The courts before and after *Saks* that have properly applied the definition adopted in *Saks* have concluded that if the cause of a passenger's injury was due to the passenger's own internal reaction to the normal flight there is no "accident," even if the carrier's negligence aggravated the passenger's pre-existing condition or was a link in the chain of causation.[8] The decision of the

[8] *See Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1521-22 (11th Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998); *Abramson v. Japan Airlines, Co., Ltd.*, 739 F.2d 130, 133 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985); *see also Hipolito v. Northwest Airlines, Inc.*, 2001 WL 861984, at *2-3 (4th Cir. July 31, 2001) (affirming summary judgment dismissing action because passenger's death on board an aircraft was not an Article 17 "accident," even where there was allegation of crew negligence); *Rajcoorar v. Air India Ltd.*, 89 F. Supp. 2d 324, 328 (E.D.N.Y. 2000) (finding inadequate medical care does not constitute an "accident"); *Walker v. Eastern Air Lines, Inc.*, 775 F. Supp. 111, 114 (S.D.N.Y. 1991) (stating that parties agreed that no "accident" occurred when airline crew aggravated pre-existing condition of passenger); *Tandon v. United Air Lines*, 926 F. Supp. 366, 369-70 (S.D.N.Y. 1996) (finding that airline crew's failure to respond with adequate medical assistance to passenger suffering a heart attack did not constitute an "accident"); *Fischer v. Northwest Airlines*, 623 F. Supp. 1064, 1065 (N.D. Ill. 1985) (finding that no "accident" occurred when defendants failed to immediately transport passenger to hospital).

Court below, however, necessarily rejects these cases in its misapplication of the Warsaw Convention and *Saks*, and creates a conflict with the Court of Appeals for the Third and Eleventh Circuits.

I

THE DECISION OF THE COURT BELOW CONFLICTS WITH THE THIRD AND ELEVENTH CIRCUITS BECAUSE IT ALLOWS RECOVERY FOR AN INJURY CAUSED BY A PASSENGER'S INTERNAL REACTION TO NORMAL FLIGHT CONDITIONS

The decision of the Court below is wrong and in direct conflict with the decisions of the Court of Appeals for the Third and Eleventh Circuits, which hold that when an injury or death "indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft," there can be no Article 17 "accident," even if the carrier's negligence aggravated the passenger's pre-existing medical condition or was a link in the chain of causation.

1. The Third Circuit Abramson Decision

In *Abramson v. Japan Airlines, Co., Ltd.*, 739 F.2d 130 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985), a leading pre-*Saks*[9] case with facts very similar to this case, the issue was whether the alleged airline's aggravation of a pre-existing injury during the course of a

[9] The *Abramson* case applied the same standard adopted by *Saks* and was cited by the Court in *Saks* as an example of the category of cases where "routine travel procedures . . . produce an injury due to the peculiar internal condition of a passenger," which the Court found does not fit within the definition of "accident" for purposes of the Convention. *See Saks*, 470 U.S. at 405.

normal flight is an Article 17 "accident." *The Third Circuit answered no.*

Plaintiff in *Abramson* suffered an attack from a pre-existing paraesophageal hiatal hernia while traveling from Anchorage to Tokyo on Japan Airlines ("JAL"). 739 F.2d at 131. When *plaintiff's wife* asked the flight attendant for a place where plaintiff could lie down and employ a self-help remedy, the stewardess responded that there were no empty seats and plaintiff was required to remain in his assigned seat. *Id.* Discovery, however, revealed that there were nine empty seats in first class. *Id.* Plaintiff brought an action against JAL, claiming that JAL's "refusal to aid him" aggravated his injury which was an "unusual and unexpected happening" and, thus, an Article 17 "accident." *Id.* at 132. Applying its "unusual or unexpected happening" test, the Court of Appeals rejected the passenger's arguments and found that JAL's alleged "acts and omissions" did not constitute an "accident":

> In the absence of proof of abnormal external factors, aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an "accident" within the meaning of Article 17.

Id. at 133.

Thus, "the occurrence that allegedly aggravated plaintiff's condition was not an 'accident' within the terms of Article 17 of the Warsaw Convention." *Id.* at 135.

2. *The Eleventh Circuit Krys Decision*

Similarly, in *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998), the issue was whether the alleged aggravation of a pre-existing condition due to crew negligence during

the course of a normal flight is an Article 17 "accident." *The Eleventh Circuit answered no.*

In *Krys*, a passenger who suffered a heart attack during a transatlantic flight brought an action against the air carrier claiming that the crew's failure to properly respond to his heart attack symptoms (*i.e.*, make an emergency landing rather than continuing to its destination), aggravated the damage to his heart. 119 F.3d at 1517. The air carrier argued that aggravation of a pre-existing condition due to crew negligence is an "accident" (thereby limiting the carrier's liability to $75,000). *Id.* at 1519.[10] The Eleventh Circuit rejected the airline's argument and found that there was no Article 17 "accident." The Court found that the only correct approach to analyzing the "accident" requirement is to look "at the factual events, as opposed to an assertion of 'crew' negligence. . . ." *Id.* at 1521-22. Unlike the Court below, the Eleventh Circuit recognized that this is the only approach which is consistent with the structure of the Convention and the Court's decision in *Saks*. *Id.* The Court explained:

> if we substitute a purely factual description of the relevant events in place of the legal conclusion represented by "crew negligence," the conclusion that no "accident" occurred is seen as the more reasonable conclusion. If, in *Abramson*, the aggravating event is having to sit upright in an airline seat throughout the duration of the flight, then it seems clear that the aggravation does not arise from an "unexpected or unusual event"—instead, the aggravation injury arises solely from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." By the same

[10] *Krys* was decided prior to the Court's exclusivity decision in *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999) and the issue of exclusivity had not been preserved for appeal by the air carrier. *Krys*, 119 F.3d at 1518, n.8.

token, ***if, in the instant case, the aggravating event is the continuation of the flight from its scheduled point of departure to its scheduled point of arrival, [footnote omitted] then it seems clear that the aggravation injury arises not from an "unexpected or unusual happening," but rather from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft."***

119 F.3d at 1521 (emphasis added and citations omitted).

3. The Ninth Circuit Decision Below

Looking to the purely factual description of relevant events, the aggravating event is Dr. Hanson remaining in his assigned non-smoking seat and being exposed to ambient smoke, which allegedly aggravated his pre-existing condition leading to his death. As in *Abramson* and *Krys*, the aggravation injury arises not from an "unexpected or unusual happening," but rather from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft."

The Court below professed that its decision was factually distinguishable from *Krys* and *Abramson*.[11] A plain reading of the facts and the holdings of each case, however, evince that they are not genuinely distinguishable:

- **As here**, *Abramson* and *Krys* involved a passenger with a pre-existing medical condition:

[11] The Court below found that in *Krys* the crew was not aware of a need for immediate action, and in *Abramson*, the crew was not aware that the passenger had an urgent medical condition nor were there several requests to move him (although the need for immediate action was surely assumed as the passenger's wife, like Dr. Husain's wife, requested a different seat assignment because of her husband's medical condition). A 13a-14a.

Abramson—a pre-existing hernia condition

Krys—a pre-existing heart condition

This case—a pre-existing asthmatic condition

- **As here**, *Abramson* and *Krys* involved an injury caused by the passenger being subjected to the normal conditions of the flight, which resulted in injury:

  Abramson—remaining in his economy class seat unable to lie down

  Krys—continuation of the flight to its scheduled destination

  This case—remaining in his non-smoking seat exposed to ambient smoke

- **As here**, *Abramson* and *Krys* involved allegations of crew negligence that was an alleged link in the chain of causation:

  Abramson—failure to provide the passenger with additional seats

  Krys—failure to make an emergency landing/misdiagnosis

  This case—failure to move Dr. Hanson to another non-smoking seat

- **Unlike here**, *Abramson* and *Krys* found no Article 17 "accident."

Accordingly, under the Third and Eleventh Circuit's interpretation of Article 17 and the Eleventh Circuit's interpretation of *Saks*, Dr. Hanson's death would not be considered to have been caused by an "accident."[12]

[12] The Fourth Circuit's interpretation of Article 17 in the unreported decision of *Hipolito*, 2001 WL 861984, at *2-3, is consistent

Under the Ninth Circuit's interpretation of Article 17 and *Saks*, it is. The conflict is clear, the conflict is direct and the conflict is irreconcilable. Certiorari should be granted to resolve this conflict and provide guidance to the lower courts as to what is an Article 17 "accident."

II

THE COURT BELOW HAS CREATED A NEW DEFINITION OF "ACCIDENT" THAT IS NOT RECONCILABLE WITH THE COURT'S DECISION IN *SAKS*, THE STRUCTURE OF THE CONVENTION AND *KRYS*

The Court below incorrectly shifted the focus of the "accident" requirement from an inquiry into the nature of the event which caused the injury (*i.e.*, the smoke), to the care taken by the airline to avert the injury (*i.e.*, a flight attendant's failure to move Dr. Hanson to another non-smoking seat), thereby creating a new "accident" standard as follows:

> The failure to act in the face of a known, serious risk satisfies the meaning of "accident" within Article 17 so long *as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane.*

A 14a (emphasis added).

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with the Third and Eleventh Circuits and, thus, also is in conflict with the Ninth Circuit. In *Hipolito*, the Fourth Circuit affirmed summary judgment dismissing the action because the passenger's asthma-related death was not an Article 17 "accident," even though there was an allegation of crew negligence. *Id.*

Saks, however, should have made clear to the Court below that the focus of the "accident" inquiry is into the nature of the event which caused the injury, and not the care taken by the airline to avert the injury. 470 U.S. at 407. The "accident" standard developed by the Court below misconstrues the nature of the liability created by the Warsaw Convention by improperly focusing the "accident" inquiry on reasonableness, foreseeability and the carrier's mental state—neither the Convention nor *Saks* makes the "accident" inquiry contingent upon the perception of a risk, "reasonable alternatives" or whether these alternatives "would not unreasonably interfere with the normal, expected operation of the aircraft."

The new "accident" standard created by the Court below ignores *Saks* and injects into Article 17 the concepts of the "absence of negligence" (Article 20(1)) and "wilful misconduct" (Article 25). The Court should provide guidance to the lower courts that this treaty does not permit the courts to relieve the passenger from meeting the condition precedent to establishing a right of recovery under Article 17 through an analysis of the negligence of a carrier's employee.

One of the primary goals of the Warsaw Convention was to limit the liability of air carriers. *See El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 169-70 (1999); *Eastern Airlines v. Floyd*, 499 U.S. 530, 546 (1991). As explained by the Court in *Tseng*, 525 U.S. at 170, the Warsaw Convention balances the interest of the passenger seeking to recover damages for injuries and the interest of the carrier to limit its liability.[13] The Con-

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[13] Before the Warsaw Convention was adopted, carriers in civil law countries were permitted to contractually disclaim liability for passenger injury or death. The drafting history of the Convention reflects the drafters' compromise with respect to passengers, between no liability and exposure to unlimited liability. *See Second Interna-*

vention was drafted as a compromise between those interests. *Id.*

The preliminary draft of what eventually became Article 17 [then draft Article 22] made the air carrier liable "in the case of death, wounding, or other bodily injury *suffered* by a traveler." *Saks*, 470 U.S. at 401 (emphasis added). The early Article 17 draft also contained language that permitted the air carrier to avoid liability by proving all reasonable measures were taken to avoid the damage. *Id.* The drafting committee changed the liability provisions, expressly narrowing the liability of the air carrier to encompass only an injury "caused" by an "accident." *Id.* at 402-03; *see Tseng*, 525 U.S. at 173. In addition, the all reasonable measures defense was removed from the liability provision and placed into a separate article [Article 20(1)].[14] Thus, the "accident" requirement of Article 17 is distinct from the due care defense of Article 20(1), a distinction overlooked by the Court below. *See Saks*, 470 U.S. at 407; *Krys*, 119 F.3d at 1522. This drafting history, together with the goals of the Convention, demonstrates that the initial "accident" inquiry is not to be resolved by reference to foreseeability, alternatives or the degree of the carrier's culpability, which were relegated to Article 20(1) and Article 25, respectively. *See Saks*, 470 U.S. at 407; *Carey v. United Airlines*, 255 F.3d 1044, 1048 (9th Cir. 2001)

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tional Conference on Private Aeronautical Law, Oct. 4-12, 1929, Warsaw Convention Minutes at 47-48 (R. Horner & D. Legrez transl. 1975).

[14] Article 20(1) provides an exception to the presumptive liability under Article 17 if the air carrier establishes that it took all necessary measures to avoid the passenger's injury or that it was impossible to take such measures. *Saks*, 470 U.S. at 406-07. Pursuant to the terms of the Montreal Agreement, this defense has been waived for international flights that originate, terminate, or have stopping points in the United States.

(definition of "accident" makes "no mention of the carrier's motive or mental state whatsoever"). The Court in *Saks* clearly stated:

> The "accident" requirement of Article 17 . . . involves an inquiry into the nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury.

470 U.S. at 407 (emphasis in original).

As explained by the Eleventh Circuit in *Krys*:

> we think that looking at the factual events, as opposed to an assertion of "crew negligence," is in accord with the design of the Warsaw Convention, which provides carriers a "due care" defense. [Footnote omitted] Having provided for a defense turning on the absence of negligence, we think it is unlikely that the drafters intended that the initial "accident" inquiry be resolved by reference to negligence. [Citation omitted].

119 F.3d at 1522-23. Indeed, the fact that crew negligence is irrelevant to the Article 17 "accident" inquiry is confirmed by the ultimate holding in *Krys*, which after finding that there was no "accident," determined that the air carrier's conduct was negligent and upheld liability under state law. *Id.* at 1528.

The focus of the Court below on "crew negligence" (*i.e.*, the failure of the flight attendant to act in light of what the Court considered to be the reasonable alternatives), conflicts with structure of the Convention, the meaning of Article 17 and its interpretation as applied in *Saks*, and as followed by the Eleventh Circuit in *Krys*.

III

THE QUESTION PRESENTED IS IMPORTANT AS THE LOWER COURTS ARE MISAPPLYING ARTICLE 17 AND *SAKS* TO CIRCUMVENT THE RESULT MANDATED BY *TSENG*

The proper interpretation of the "accident" condition precedent to liability is of particular importance as there is an increasing amount of health-related passenger litigation (*e.g.*, heart attacks, deep vein thrombosis (DVT)) and the issue arises in each action whether such passengers are entitled to recovery if an air carrier fails to provide them with special accommodations even though the injury is due to a pre-existing medical condition that is aggravated by exposure to the normal and expected conditions on the aircraft.

In *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999), the Court addressed the question of the exclusivity of the Warsaw Convention and held that "recovery for a personal injury suffered 'on board [an] aircraft or in the course of any of the operations of embarking or dismembarking,' if not allowed under the Convention, is not available at all." *Id.* at 161 (citation omitted).

Prior to *Tseng*, the majority of lower courts viewed that an aggravation of a passenger's pre-existing medical condition was not an Article 17 "accident," even if there were allegations of crew negligence. *See supra* note 8. While *Tseng* did not implicate the meaning of the term "accident," courts, such as the district court below,[15] have redefined "accident" for the sole purpose of cir-

[15] The district court below rejected *Krys* and *Abramson* based in part upon its concern for a dissolution of the carrier's duty of care and perception of a "sudden sea change" as to the meaning of an "accident" after *Tseng*. A 58a.

cumventing the clear holding of *Tseng*. These post-*Tseng* cases find that pre-*Tseng* accident cases are not instructive and hold that an aggravation of a passenger's pre-existing medical condition can be an Article 17 "accident" because, to hold otherwise, would deprive the passenger of a potential remedy under state law. *See Gupta v. Austrian Airlines*, 211 F. Supp. 2d 1078, 1084 (N.D. Ill. 2002) (holding that the carrier's failure to assist an ailing passenger from a pre-existing medical condition may be an "accident;" pre-*Tseng* "accident" cases are not instructive because the Warsaw Convention is now plaintiff's exclusive remedy); *McCaskey v. Continental Airlines, Inc.*, 159 F. Supp. 2d 562, 573 (S.D. Tex. 2001) (holding that reliance upon *Abramson* and *Krys*, pre-*Tseng* decisions, was misplaced and that a carrier's failure to respond to an injury suffered onboard an aircraft may be an "accident"); *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 666 (S.D.N.Y. 2001) (finding pre-*Tseng* holdings in *Abramson* and *Krys* may have been affected by the non-exclusivity of the Convention and are not controlling).

There is no basis in law for such a misapplication of the term "accident." In *Saks* and *Tseng*, the passenger was left without a right of recovery and the treaty language has not changed to deviate from this result. Simply because a passenger's exclusive remedy is provided by the Warsaw Convention does not change the Article 17 "accident" analysis, nor does it render pre-*Tseng* decisions meaningless. The Court in *Tseng* specifically made clear: "Postratification adjustments . . . are appropriately made by the treaty signatories," not the courts. 525 U.S. at 673 n.12; *see Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 231 (1996) ("it is the function of Congress, and not of this Court, to decide that domestic law, alone or in combination with the Convention, provides inadequate deterrence."); *Floyd*, 499 U.S. at 546

(Convention must be interpreted to give effect to drafters' concern of protecting the carrier rather than providing full recovery to injured passenger); *Carey*, 255 F.3d at 1053 ("To the extent that such plaintiffs are left without a remedy, no matter how egregious the airline's conduct, that is a result of the deal struck among the signatories to the Warsaw Convention."). As noted by Judge Wallace in his prescient dissent in *Saks*, which rejected similar reasoning by that Panel's majority decision:

> the majority's reading of the Convention "is bottomed on a social theory of compensation designed to spread the burden of damages from travel to all travelers," a theory alien to the Convention's language, even accounting for the private Montreal Agreement. Recovery for damages under article 17 of the Convention requires more than travel or an occurrence: it requires an accident. Normal cabin depressurization is no accident.

Saks v. Air France, 724 F.2d 1383, 1390 (9th Cir. 1984) (Wallace, J., dissenting) (citations omitted), *rev'd*, 470 U.S. 392 (1985).

The Court should grant certiorari to provide definitive guidance to the lower courts as to the proper interpretation of Article 17, the Court's decision in *Tseng* and to ensure a consistent and correct application of the Warsaw Convention.

CONCLUSION

Based upon the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: March 12, 2003

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 00-14509

Argued and Submitted February 12, 2002

Filed December 12, 2002

RUBINA HUSAIN, individually and as personal representative of the estate of; Abid M. Hanson, M.D.; Hannah Husain; Sarah Husain; Isaac Husain, by and through their Guardian ad Litem, Rubina Husain,

Plaintiffs-Appellees,

—v.—

OLYMPIC AIRWAYS,

Defendant-Appellant.

SUSIE INJIJIAN, Sterns and Walker, Oakland, CA, *for the plaintiff-appellee*.

ANDREW J. HARAKAS, Condon and Forsyth, New York, NY, *for the defendant-appellant*.

Appeal from the United States District Court
for the Northern District of California;
Charles R. Breyer, District Judge, Presiding.
D.C. No. CV-99-01400-CRB.

Before

REINHARDT and FISHER, *Circuit Judges*,
and MOLLOY, *District Judge*.*

OPINION

MOLLOY, *District Judge*:

I. Introduction

After a non-jury trial, the district court determined that Dr. Abid M. Hanson's death on Olympic Airways ("Olympic") Flight 417 was caused by an accident as defined by Article 17 of the Warsaw Convention. The trial judge also found the accident resulted from willful misconduct by Olympic's employees. The district court awarded $1,400,000 in damages. Olympic appeals the determinations of the district court and the award of damages. We hold that the district court's findings are not clearly erroneous and we AFFIRM.

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* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

II. Factual and Procedural Background

A. Overview

On January 4, 1998, 52 year-old Dr. Abid M. Hanson died while a passenger on Olympic Flight 417 between Athens, Greece and New York City. His death occurred after he suffered complications when he was exposed to ambient second-hand smoke while seated in the airplane's non-smoking section three rows in front of the smoking section. The plane had clearly demarcated sections for seating, one for smokers and one for non-smokers, though no partition separated the two. Dr. Hanson's wife, Rubina Husain, had asked Olympic's employees on multiple occasions with increasing urgency to move Dr. Hanson to another seat away from the smoking section. She explained the critical reasons Dr. Hanson had to move and made her concerns known about the consequences of leaving him exposed to the offensive smoke. Ms. Husain's requests were ignored, primarily by flight attendant Maria Leptourgou. Dr. Hanson died from a severe asthma attack caused by the smoke exposure.

Plaintiffs filed suit in California Superior Court for Alameda County on December 24, 1998. Olympic removed the action to the United States District Court for the Northern District of California on March 23, 1999. On February 25, 2000, Olympic moved for summary judgment claiming Dr. Hanson's death was not caused by an accident as defined by Article 17 of the Warsaw Convention.[1] The district court denied the motion for summary judgment without a written opinion

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[1] The full name of the Warsaw Convention is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following *49 U.S.C. § 40105* [hereinafter Warsaw Convention].

on March 24, 2000. A three-day bench trial was held May 30 through June 1, 2000. After the parties presented evidence, the district court asked for post-trial briefs and agreed to hear closing arguments on July 20, 2000. Findings of fact and conclusions of law were entered on August 8, 2000 finding Ms. Leptourgou's failure to move Dr. Hanson to a new seat was an accident under Article 17 of the Warsaw Convention and proximately caused his death. The trial judge found Ms. Leptourgou's refusal to help Dr. Hanson constituted willful misconduct under Article 25 of the Warsaw Convention.

The district court awarded Plaintiffs $1,400,000, but reduced the award by 50% due to Dr. Hanson's comparative negligence. On October 2, 2000, the district court issued amended findings of fact and conclusions of law. Supplemental findings of fact and conclusions of law were issued on November 28, 2000 awarding Plaintiffs an additional $700,000 in non-pecuniary damages. Final judgment was entered on November 28, 2000. Olympic timely appealed.

B. Facts as Determined by the District Court[2]

For more than 20 years before his death on January 4, 1998, Dr. Hanson had been sensitive to secondhand smoke and tried to avoid smoke-filled areas. He suffered from asthma for which he did not receive regular treatment. However, he regularly carried and used a Proventil/Albuterol inhaler to aid his breathing. The frequency of Dr. Hanson's use of the inhaler increased as he aged.

Dr. Hanson was also allergic to many foods, including grapes, yeast and tomatoes. The extent of his allergies is

[2] *See Husain v. Olympic Airways, 116 F.Supp.2d 1121 (N.D.Cal.2000).*

unclear; however, Dr. Hanson often ate tomato-based foods without suffering a reaction.

Before his death, Dr. Hanson had suffered two medical emergencies that may have been caused by asthma or food allergies. In December 1996, Dr. Hanson and his wife were at a smoky restaurant in Las Vegas, Nevada for approximately ten minutes. Before returning to their hotel room, Dr. Hanson and his wife shared a piece of quiche and some cheese pizza. Shortly after returning to the hotel room, Dr. Hanson began having breathing difficulties, to the extent that Ms. Husain called paramedics and had to perform CPR. The paramedics gave Dr. Hanson a shot of epinepherine and transported him to the hospital where he remained overnight.

The cause of the Las Vegas attack is unclear. However, at trial, experts for both parties agreed that the episode was likely caused by food-related allergies. Following the Las Vegas attack, Dr. Hanson began carrying an emergency kit containing epinepherine.

During the summer of 1997, Dr. Hanson suffered another attack after dining at the home of friends in California. After he returned from a post-dinner walk, Ms. Husain noticed Dr. Hanson was having a difficult time breathing and called paramedics. The paramedics gave Dr. Hanson oxygen and observed him for a short period of time. Dr. Hanson was not taken to the hospital, nor was any epinepherine administered. The cause of the breathing difficulties is unknown.

In December 1997, Dr. Hanson, Ms. Husain and their family flew from San Francisco to Athens and Cairo for vacation. The trip involved a stop in New York. Dr. Hanson learned for the first time at the airport in New York that Olympic allowed smoking on international flights. Dr. Hanson and his family asked to be seated in the non-smoking section and their request was honored. On the

flights to Athens and Cairo, the family was seated in non-smoking seats away from the smoking section and were not exposed to ambient smoke. Dr. Hanson did not suffer from breathing problems during the trip.

On January 4, 1998, Dr. Hanson and his family began the return trip from Cairo to the United States via Athens. The family arrived at the Cairo airport early to ensure they obtained non-smoking seats. Ms. Husain showed the check-in agent a letter from Dr. Hanson's brother, who was also a doctor, indicating that Dr. Hanson had asthma. The family was seated in the non-smoking section on the flight from Cairo to Athens and Dr. Hanson did not experience any breathing problems.

During a three to four hour layover in Athens, Dr. Hanson began having problems breathing. The waiting area was very smoky and Dr. Hanson was forced to use his inhaler. An attempt to move to the slightly less smoky first-class lounge was thwarted by airport officials.

Upon boarding Olympic Airways Flight 417 from Athens to New York, Dr. Hanson and his family discovered that they were seated in non-smoking seats, but only three rows ahead of the smoking section which was not partitioned off.[3] Immediately after finding their seats, Ms. Husain approached flight attendant Maria Leptourgou, informed her that Dr. Hanson could not be near the smoking section, and asked Ms. Leptourgou to move him. Ms. Leptourgou responded by telling Ms. Husain to "have a seat."[4]

[3] The airplane was a Boeing 747 with 426 seats in 56 rows. Rows one through 13 were business class seats, while rows 14 through 56 were economy class. In economy class, rows 14 through 50 were non-smoking seats and the seats in rows 51 through 56 were in the smoking section. Dr. Hanson was seated in row 48, seat E.

[4] Ms. Leptourgou was not available for the trial and had not been deposed. The district court noted that its factual findings regarding Ms. Leptourgou were based primarily on Ms. Husain's testimony, which the district judge found "quite credible." *Husain, 116 F.Supp.2d at 1125 n. 2.* The district court also noted that Ms. Husain's testimony was corroborated by the testimony of the Sabharwals, friends of Dr. Hanson and his family who accompanied them on the trip, and Issac and Sarah Husain, and "much of the uncontradicted evidence." *Id.*

After all of the passengers were seated, but before take-off, Ms. Husain once again approached Ms. Leptourgou and adamantly asked that she move Dr. Hanson to another seat, explaining that he was allergic to smoke. Ms. Leptourgou refused, stating that she was "too busy" and the flight was "totally full." *Husain, 116 F.Supp.2d at 1125.*

Immediately after take-off, passengers in the smoking section were allowed to begin smoking. From that point forward, people in the smoking section were smoking continuously, including people seated in rows 51 through 56 and people in other rows who moved back to the smoking section to smoke and socialize. The smoke began to envelope Dr. Hanson and his family. After Dr. Hanson indicated that the smoke was bothering him, Ms. Husain approached Ms. Leptourgou and, for the third time on the airplane, told her that she needed to move Dr. Hanson for health reasons. Ms. Leptourgou again refused stating that the plane was full. She did tell Ms. Husain that she and Dr. Hanson could ask other passengers to switch seats, but they would not be assisted by the flight crew. Despite one last plea for help by Ms. Husain, Ms. Leptourgou refused to help Dr. Hanson find another seat.[5]

[5] Despite Leptougou's statements otherwise, Flight 417 was not full. The flight had 11 unoccupied seats, two of which were in business class. The flight was also carrying 28 non-revenue passengers, including employees and relatives of employees of Olympic and other airlines, 17 of whom were seated in business class or in the non-smoking section. *Husain, 116 F.Supp.2d at 1126.*

The amount of smoke floating around row 48 only increased as the flight progressed, especially after a meal was served. While Dr. Hanson ordered a meal, he did not eat much, and shared his meal with his daughter and another passenger. After the meal, Dr. Hanson's breathing problems worsened. He had emptied one inhaler and asked Ms. Husain to get another one. After telling his daughter that the smoke was bothering him, he walked to the front of the cabin to get some fresh air.

Ms. Husain followed Dr. Hanson to an area between rows 19 and 20 where he had stopped and was leaning against a chair. The doctor asked for his epinepherine kit, which Ms. Husain retrieved and then administered a shot. She then went to notify Dr. Umesh Sabharwal, an allergist and family friend who was traveling with Dr. Hanson and his family.

Dr. Sabharwal helped Dr. Hanson to the floor, administered another shot of epinepherine, and then began performing CPR. Dr. Hanson's pulse was barely detectable and his lower airway was obstructed, though the upper airway was not. Dr. Sabharwal continued to perform CPR and also administered a shot of Bricanyl. Dr. Hanson was also given oxygen during this time.[6] Despite the efforts of Dr. Sabharwal and other passengers who assisted, Dr. Hanson died.

Because of religious reasons, there was no autopsy to determine the direct cause of death. In the district court and here, Plaintiffs argued that Dr. Hanson died from a severe asthma attack caused by inhaling secondhand

[6] The district court found the testimony regarding who supplied and administered the oxygen was "entirely contradictory." *Husain, 116 F.Supp.2d at 1127 n. 7.* Some witnesses testified that the oxygen was supplied from a canister and mask belonging to Olympic, while others testified the oxygen came from a canister and mask from Dr. Hanson's emergency kit.

smoke. Defendants believe that Dr. Hanson's death was the result of an allergic reaction to food or some other medical problem unrelated to the smoke. The district court determined that the smoke exposure during Flight 417 was the primary cause of Dr. Hanson's death. We abide by and defer to those findings.

Of major significance to the district court was the timing of the events. First, Dr. Hanson was complaining about the secondhand smoke before the meal was served. Second, while Dr. Hanson had some food allergies and he did eat some food on the flight, there was no evidence that he ate any foods to which he was allergic. Third, experts for both parties and Dr. Sabharwal testified that smoke was a contributing factor, though the degree to which it contributed was disputed. Nonetheless, it is for the district court to resolve the factual disputes and to draw inferences from the proof.

III. Analysis

A. Standard of Review

A district court's findings of fact are reviewed for clear error. *Freeman v. Allstate Life Ins. Co., 253 F.3d 533, 536 (9th Cir.2001).* Clear error review is deferential to the district court, requiring a "definite and firm conviction that a mistake has been made." *See Easley v. Cromartie, 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001).* Thus, if the district court's findings are plausible in light of the record viewed in its entirety, the appellate court cannot reverse even if it is convinced it would have found differently. *United States v. Working, 224 F.3d 1093, 1102 (9th Cir.2000)* (en banc).

A district court's conclusions of law are reviewed de novo. *Freeman, 253 F.3d at 536.* However, if the application of the law to the facts requires an inquiry that is

"essentially factual," review is for clear error. *Koirala v. Thai Airways Int'l, Ltd., 126 F.3d 1205, 1210 (9th Cir.1997)*. A district court's determination of proximate cause is reviewed for clear error. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg. Planning Agency, 216 F.3d 764, 783 (9th Cir.2000), aff'd, 535 U.S. 302, 122 S.Ct. 1465 (2002)*. Likewise, a district court's finding of "willful misconduct" under Article 25 of the Warsaw Convention is reviewed for clear error. *Koirala, 126 F.3d at 1210*.

B. Dr. Hanson's Death Was Proximately Caused by an "Accident" Under Article 17 of the Warsaw Convention

(1) Article 17 "accident"

Liability for harm to international air travelers is established by Article 17 of the Warsaw Convention. Article 17 provides, in its entirety:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Warsaw Convention, art. 17. For a carrier to be liable to an injured passenger, the passenger must prove an accident caused the injury. *Air France v. Saks, 470 U.S. 392, 396, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985)*. As defined by the Supreme Court, an accident is "an unexpected or unusual event or happening that is external to the passenger." *Id. at 405, 105 S.Ct. 1338*.

When determining whether an accident has occurred, the definition of accident "should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." *Id.* Where there is contradictory evidence, "it is for the trier of fact to decide whether an 'accident'. . . caused the passenger's injury." *Id.* If the passenger's injury "indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft," it is not the result of an accident as envisioned under Article 17. *Id. at 406, 105 S.Ct. 1338*.

The district court found Ms. Leptourgou's refusal to move Dr. Hanson to another seat, despite three increasingly desperate requests by Ms. Husain, was an accident under Article 17. It did so because Ms. Leptourgou (1) violated the recognized standard of care for flight attendants on international flights by refusing to assist; (2) violated Olympic's policy; and (3) failed to alert the chief cabin attendant or another flight attendant to help Dr. Hanson find another seat. The district court found that Ms. Husain specifically told Olympic workers, including Ms. Leptourgou, that Dr. Hanson was "susceptible to smoke," "allergic to smoke," and "could not be in any smoke." Despite these warnings, Ms. Leptourgou refused to assist Dr. Hanson. Considering the warnings and knowledge of the doctor's medical problems, Ms. Leptourgou's actions constituted an unusual or unexpected event. Ultimately, the district court concluded that Ms. Leptourgou's actions created a foreseeable risk of injury and therefore constituted an accident under Article 17.

Olympic argues Dr. Hanson's death resulted from "internal reactions to the usual, normal, and expected operation of the aircraft" and therefore cannot have resulted from an accident. A predicate of the argument is

that the presence of ambient smoke in the cabin is "an expected and normal aspect of international air travel." Consequently, Olympic argues it had no duty to move Dr. Hanson. Olympic further contends that Dr. Hanson's pre-existing allergies, not his exposure to ambient secondhand smoke, led to his death.

Plaintiffs in essence contend that a flight attendant who does nothing to deal with a known risk to a passenger's health-related travel problems is negligent. Because Ms. Leptourgou's conduct was negligent, it fits the definition of accident under Article 17. Plaintiffs argue that crew negligence is external to the passenger and is not a reasonably expected part of international travel.

In *Abramson v. Japan Airlines Co.*, plaintiff Stanley Abramson suffered from a pre-existing paraesophagel hiatal hernia for which he had been undergoing treatment for six years. *739 F.2d 130, 131 (3d Cir.1984).* Abramson had been hospitalized for the condition in June 1981 and had been informed that he should have elective surgery to alleviate the condition. *Id.*

In August 1982, Abramson's condition began to bother him while on a Japan Airlines flight. *Id.* Abramson had not informed Japan Airlines of his condition. When Abramson's wife asked that he be able to lie down across multiple seats to apply a self-help remedy to relieve the pain, a flight attendant told her there were no empty seats. *Id.* It was later determined through discovery in the case that nine first class seats were open. *Id.*

Abramson alleged that the flight attendant's refusal to allow him to lie down caused his condition to worsen, ultimately leading to his hospitalization. The district court entered summary judgment in favor of Japan Airlines finding that Abramson's injuries were not the result

of an accident. *Id.* The Third Circuit affirmed the district court, finding that an aggravation of an existing injury during a routine flight, absent "proof of abnormal external factors," was not an unusual or unexpected event. *Id. at 133.*

In *Krys v. Lufthansa German Airlines,* plaintiff Leonard Krys began feeling ill during the first few hours of a ten-hour Lufthansa German Airlines ("Lufthansa") flight between Miami, Florida and Frankfurt, Germany. *119 F.3d 1515, 1517 (11th Cir.1997).* A doctor on board was summoned by flight attendants to tend to Krys. The crew did not make an unscheduled landing, instead relying on the doctor's opinion that Krys was okay. While the plane was flying over Amsterdam, the doctor determined that Krys had likely had a heart attack. After landing in Germany, Krys was taken to a hospital where doctors confirmed that he had suffered a heart attack. *Id.*

Krys filed suit alleging that the crew acted negligently when it failed to properly respond to his symptoms, and that those negligent acts aggravated his injuries. *Id.* The Eleventh Circuit affirmed a district court judgment in Krys' favor, finding that the plane continuing to its intended destination—the "aggravating event" leading to Krys' injury—was not an unexpected or unusual event and therefore not an accident under Article 17. *Id. at 1521-22.* Ironically, the airline—in an effort to invoke the Warsaw Convention's liability limit—was urging the Eleventh Circuit to find that Krys' injuries were the result of an accident, while Krys argued that his heart attack was *not* caused by "an unexpected or unusual event external to the passenger." *Id. at 1518-20.*

The situations in *Krys* and *Abramson* are factually different from Dr. Hanson's case. In *Krys,* Lufthansa employees relied upon the advice of a doctor who had been summoned from among the passengers and made

the initial, albeit erroneous, determination that Krys had not suffered a heart attack. Thus, Lufthansa was not aware that there was a need for immediate action. Likewise, in *Abramson*, defendant Japan Airlines was not informed that Abramson had a medical condition that required such action. Nothing in Abramson's case indicates that he made multiple requests or informed the crew of the urgency of the situation. By contrast, Ms. Husain repeatedly informed Ms. Leptourgou and other Olympic personnel that Dr. Hanson could not be exposed to smoke for health reasons, and that it was necessary that he be moved immediately. Despite her knowledge of Dr. Hanson's health risk, Ms. Leptourgou failed to act.

The district court found, after examining evidence establishing industry standards and Olympic's policies regarding passengers with medical needs, that this failure to act was a "blatant disregard of industry standards and airline policies." *Husain, 116 F.Supp.2d at 1134.* Ms. Leptourgou's failure to act was more egregious in light of the simple nature of Ms. Husain's request, which could easily have been satisfied without interference with the airplane's normal operation. Combined, these factors bring Ms. Leptourgou's failure to assist Dr. Hanson within the meaning of an "accident" for Article 17 purposes. Her conduct was clearly external to Dr. Hanson, and it was unexpected and unusual in light of industry standards, Olympic policy, and the simple nature of Dr. Hanson's requested accommodation. The failure to act in the face of a known, serious risk satisfies the meaning of "accident" within Article 17 so long as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane.

Because the district court's conclusion that Ms. Leptourgou's failure to help Dr. Hanson constituted an unexpected or unusual event is inextricably intertwined with the facts in this case, it is reviewed for clear error. *See Koirala, 126 F.3d at 1210.* Based on the record before the district court, we cannot conclude that it clearly erred.

(2) Accident as proximate cause of Dr. Hanson's death

For a carrier to be liable to a passenger for an injury, the passenger must prove the accident caused the injury. *Saks, 470 U.S. at 396, 105 S.Ct. 1338.* "Any injury is the product of a chain of causes" and the passenger need only prove "some link in the chain was an unusual or unexpected event external to the passenger." *Id. at 406, 105 S.Ct. 1338.*

Olympic argues that Dr. Hanson's death resulted from his pre-existing food allergies, noting that the meal served on Flight 417 included numerous food items to which Dr. Hanson was allergic. Pointing to past incidents where Dr. Hanson suffered medical problems ostensibly after eating foods to which he was allergic, Olympic further asserts the exact cause of Dr. Hanson's death is unknown because food-related anaphylaxis cannot be ruled out and there was no evidence presented to show asthma caused his death. Finally, Olympic asserts there was no evidence Dr. Hanson would have lived had Olympic found him a different seat.

Plaintiffs counter that the evidence showed secondhand smoke around Dr. Hanson's seat was heavy, especially after mealtime, and that there was no evidence showing anaphylaxis caused Dr. Hanson's death. Plaintiffs also assert that secondhand smoke need not be the sole cause of Dr. Hanson's death, as long as it is a cause.

In its findings of fact, the district court rejected the assertion that Dr. Hanson died as a result of food-related anaphylaxis. Rather, the district court found Dr. Hanson's died as a result of exposure to secondhand smoke. The district court stated:

> The Court cannot credit defendant's suggestion that Dr. Hanson's breathing problems prior to the meal were causally unrelated to his later asphyxiation. The evidence before the Court suggests exactly the opposite conclusion. Dr. Hanson explicitly complained that smoke was affecting his breathing just hours before his death, complained to his wife about the level of cigarette smoke on the plane, and relied extensively on his inhaler for support during the hours leading to his fatal attack. To conclude, as defendant urges, that the smoke on Flight 417 did not trigger Dr. Hanson's death is to ignore the chain of events leading up to his attack.

Husain, 116 F.Supp.2d at 1128-29. Further, the district court considered Dr. Hanson's previous reactions to food and the food served on the plane, yet found Dr. Hanson was suffering breathing difficulties before the meal on the airplane was served and that there was not any testimony that Dr. Hanson ate any of the foods he was allergic to while on Flight 417.

As discussed above, it is apparent that the failure to move Dr. Hanson caused exposure to the smoke that led to his death. There was testimony at trial that the smoke around Dr. Hanson was particularly thick. Olympic personnel were aware of Dr. Hanson's condition, yet they did nothing to assist him. Under *Saks,* the accident need not be the sole cause of the injury, but it must-be a "link in the chain." *470 U.S. at 406, 105 S.Ct. 1338.* In this case, the exposure to smoke and failure to move Dr.

Hanson is such a link. The facts as determined by the district court, and confirmed by the record, establish that seats were available and that Ms. Leptourgou's failure to help Dr. Hanson resulted in continued exposure to second hand smoke. The district court concluded that had Ms. Leptourgou heeded Ms. Husain's requests for help, Dr. Hanson would not have been exposed to second hand smoke and would not have died. In other words, the minimization of the risk of smoke exposure would have prevented the physiological response that caused his death.

Whether Dr. Hanson's death was caused by a reaction to second hand smoke resulting from Ms. Leptourgou's failure to assist or by a reaction to food allergies may appear to be a close call. However, the district court, as the trier of fact, was in the best position to determine which of two plausible explanations was correct. The district court's determination here is plausible in light of the record before the district court, thus is not clearly erroneous, and will not be disturbed on appeal.

C. Dr. Hanson's Death Was Proximately Caused by Olympic's "Willful Misconduct" Under Article 25 of the Warsaw Convention

Carrier liability for injuries caused by an accident is usually limited to $75,000 per passenger. However, Article 25 provides that injuries that result from the carrier's willful misconduct or the willful misconduct of an employee acting within the scope of her employment are excluded from the liability limits[7].Warsaw Convention,

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[7] Montreal Protocol No. 4 later amended the Warsaw Convention's "willful misconduct" standard to one of "intentionally or recklessly with knowledge that damage would probably result." The United States Senate ratified the Protocol in November 1998 and it went into force in the United States on March 4, 1999. *Carey v.*

art. 25. Article 25 does not create a separate cause of action and therefore a plaintiff must establish both an accident and willful misconduct to be able to recover above the $75,000 limit. *McDowell v. Cont'l Airlines, 54 F.Supp.2d 1313, 1321 (S.D.Fla.1999).*

Willful misconduct has been defined as "the intentional performance of an act with knowledge that the . . . act will probably result in injury or damage or the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences."[8] *Koirala, 126 F.3d at 1209* (quoting *Johnson v. Am. Airlines, Inc., 834 F.2d 721, 724 (9th Cir.1987)*). At a minimum, a plaintiff must prove the carrier "must have known" of the risk to prove willful misconduct. *Piamba Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1291 (11th Cir.1999).* Determining willful misconduct is based on a subjective standard and can be satisfied through circumstantial evidence. *Koirala, 126 F.3d at 1211.*

United Airlines, 255 F.3d 1044, 1047 n. 11 (9th Cir.2001) (citations and internal quotations omitted).

[8] This Court has also analyzed Article 25's "willful misconduct" standard under California law. *See Dazo v. Globe Sec. Servs., 295 F.3d 934, 940-41 (9th Cir.2002)* (cargo case). Under California law, willful misconduct is distinguishable from negligence:

> Unlike negligence, which implies a failure to use ordinary care, and even gross negligence, which connotes such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, willful misconduct is not marked by a mere absence of care. Rather, it involves a more positive intent actually to harm another or to do an act with a positive, active, and absolute disregard of its consequences.

Id. at 941 (citing Calvillo-Silva v. Home Grocery, 19 Cal.4th 714, 80 Cal.Rptr.2d 506, 968 P.2d 65, 76 (1998) (citations and internal quotations omitted)). Ms. Leptourgou's failure to act constituted willful misconduct under either of these standards.

In *Koirala,* a plane crashed into a mountain after the crew flew in the wrong direction for six minutes while attempting to land in Kathmandu. *Id. at 1208.* Thai Airways argued that the evidence showed the crew was stressed because of poor weather and difficult landing conditions and that the evidence did not show the crew consciously failed to look at their instruments. *Id. at 1210.* This Court found the district court did not clearly err in finding willful misconduct given the crew's failure to realize the plane was flying in the wrong direction for six minutes. *Id.* In reaching its conclusion, this Court paid particular attention to expert testimony offered by the plaintiffs to establish the standard of care. *Id. at 1211.*

Like the crew in *Koirala,* Ms. Leptourgou's failure to take action, either by moving Dr. Hanson or by notifying the chief cabin attendant of Ms. Husain's request to have her husband moved, was willful misconduct. The district court concluded "Ms. Leptourgou *must have known* that the cabin was not full, that Dr. Hanson had a medical problem and a special susceptibility to smoke, and that her failure to move him would aggravate his condition and cause him probable injury." *Husain, 116 F.Supp.2d at 1139.* This conclusion is supported by the record in this case, including the highly credible testimony of Ms. Husain. Additionally, because Ms. Leptourgou did not testify in person or by deposition, Ms. Husain's version of events was uncontradicted.

Of equal import was testimony by Plaintiffs' expert that Ms. Leptourgou was aware of the industry standard of care and Olympic policy regarding passengers requesting seat transfers for medical reasons. This established that Ms. Leptourgou should have assisted Dr. Hanson in finding a new seat, especially since there were available seats further away from the smoking section.

Ms. Leptourgou's duty to act was compounded by the urgency of Ms. Husain's requests.

Olympic argues that Plaintiffs did not show Ms. Leptourgou engaged in misconduct or that she was subjectively aware of the risk of harm to Dr. Hanson. In Olympic's view, all of the seats in Ms. Leptourgou's section were full so she was not aware the flight was not totally full, and she was not aware of the risk of harm to Dr. Hanson because he did not ask to be moved, nor did he or Ms. Husain seek a different seat when Ms. Leptourgou told them they could. Even so, she still did not advise the crew chief of the problem.

However, as the district court determined, Ms. Husain "was not merely a typical passenger complaining about an inconvenient seat assignment," because her repeated requests became increasingly "emphatic and desperate." *Id.* Based on Ms. Husain's testimony, the district court found Ms. Leptourgou could not have "failed to recognize that Dr. Hanson's problem was a medical one and that sitting near the smoking section was likely to cause him injury." *Id.* Despite this, Ms. Leptourgou "deliberately closed her eyes to the probable consequences of her acts." *Id.*

The district court, as the trier of fact in this matter, was in a superior position to appraise and weigh the evidence, and its determination regarding the credibility of witnesses is entitled to special deference. *See Anderson v. City of Bessemer, 470 U.S. 564, 573-75, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); Allen v. Iranon, 283 F.3d 1070, 1078 n. 8 (9th Cir.2002).* The district court's decision was based on the testimony of Ms. Husain, Plaintiffs' expert, and Olympic's own employees, and is well-grounded in the record. While establishment of willful misconduct requires a party to satisfy a high burden, the evidence before the district court in this case is

sufficient to meet that burden. The facts in the record establish that Ms. Leptourgou was aware that Dr. Hanson was in a desperate situation that required immediate assistance, yet despite this knowledge and increasingly emphatic pleas from Ms. Husain, Ms. Leptourgou ignored Olympic's policy and industry standards and refused to assist Dr. Hanson. This amounts to a dereliction of duty that is not only unusual and unexpected on an international flight, but willful.

The district court's conclusion that Ms. Leptourgou's actions were willful misconduct cannot be disturbed on review unless we are left with a "definite and firm conviction that a mistake has been made." *Sec. Farms v. Int'l Bhd. of Teamsters, 124 F.3d 999, 1014 (9th Cir.1997).* Based on facts in the record and the exhaustive findings by the district court, we cannot conclude that a mistake has been made.

IV. Conclusion

We decide that the district court's findings and conclusions are well-grounded in the record. Olympic's argument asks this Court to substitute its judgment and second guess the district court. This we cannot do. Olympic failed to meet its burden of showing that the district court's findings are clearly erroneous and that the district court erred in its application of the law. Therefore, we affirm the judgment of the district court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 99-1400 CRB

RUBINA HUSAIN, individually and as personal representative of the estate of ABID M. HANSON, M.D.; HANNAH HUSAIN; SARAH HUSAIN and ISAAC HUSAIN, minors, by and through their Guardian ad Litem, RUBINA HUSAIN,

Plaintiffs,

—v.—

OLYMPICA AIRWAYS,

Defendant.

JUDGMENT

Pursuant to the Court's Amended Findings of Fact and Conclusions of Law dated October 2, 2000 and its Supplemental Findings of Fact and Conclusions of Law dated November 28, 2000, it is hereby ordered that Judgment be entered in favor of the plaintiffs and against the defendant in the amount of $1,400,000.00.

IT IS SO ORDERED.

Dated: November 28, 2000

CHARLES R. BREYER
CHARLES R. BREYER
United States District Judge

UNITED STATES DISTRICT COURT
N.D. CALIFORNIA

No. C 99-1400 CRB

November 28, 2000

RUBINA HUSAIN, individually and as personal representative of the estate of Abid M. Hanson, M.D.; Hannah Husain; Sarah Husain and Isaac Husain, minors, by and through their Guardian ad Litem, Rubina Husain,

Plaintiffs,

—v.—

OLYMPIC AIRWAYS,

Defendant.

SUPPLEMENTAL FINDINGS OF FACT
AND CONCLUSIONS OF LAW

BREYER, J.

Now before the Court is the plaintiffs' motion for modification and/or clarification of this Court's Findings of Fact and Conclusions of Law issued on August 28, 2000 ("Findings"). The plaintiffs filed their motion on September 5, 2000. On October 2, 2000, the Court issued an Amended Findings of Fact and Conclusions of Law ("Amended Findings"), which was nearly identical

to the Findings with the exception of several minor technical corrections involving the numbering of section headings. Thus, the Court will treat the plaintiffs' motion as a motion to modify and/or clarify the Amended Findings. After seeking guidance from the parties regarding several factual and legal issues, the Court now issues the following Supplemental Findings of Fact and Conclusions of Law in response to the plaintiffs' motion.

BACKGROUND

The Court need not repeat the extensive facts outlined in its Amended Findings, but a brief review of the case is helpful. This suit arose from the death of Dr. Abid M. Hanson on an international passenger flight in January 1998. Dr. Hanson suffered from asthma, and he died after inhaling a significant amount of second-hand smoke. He was accompanied on the flight by his then 41-year-old wife Rubina Husain and their three children Hannah, Sarah, and Isaac, then aged 10, 17, and 19, respectively.

After a bench trial on May 30-June 1, 2000, the Court issued its Findings on August 28, 2000, and the Amended Findings on October 2, 2000. The Court found that Olympic Airways was liable under the Warsaw Convention since Dr. Hanson's death was an "accident" as defined by the Convention. It also held that the defendant's liability was not limited to $75,000 since the defendant had engaged in willful misconduct. In addition, the Court determined that Dr. Hanson was comparatively liable for his own death at a rate of fifty percent.

The Court then observed that the evidence supported "an award of damages commensurate with the pecuniary loss to Dr. Hanson's surviving family." Amended Findings at 36. However, it noted that "[t]he parties have not

established in their briefs or their arguments to the Court that damages in excess of that amount are legally appropriate in this case." *Id.* After calculating the pecuniary loss to the plaintiffs at $1,400,000, the Court discounted that figure by fifty percent to account for Dr. Hanson's comparative fault and awarded the plaintiffs damages in the amount of $700,000 for Dr. Hanson's wrongful death.

DISCUSSION

The plaintiffs brought their motion seeking clarification of this Court's statement that "[t]he parties have not established in their briefs or their arguments to the Court that damages in excess of that amount are legally appropriate in this case." The plaintiffs argue that California law governs the damages this Court may award, and that California law permits a court to award non-pecuniary damages. Moreover, they assert that the evidence they presented at trial supports an award for the non-economic losses suffered by the Husains.

I. CHOICE OF LAW

The plaintiffs are correct that California law governs this suit. The parties agree that Dr. Hanson died while the Olympic Airways plane was flying over Germany, so the Death on the High Seas Act does not apply. Accordingly, the Court must instead resort to California choice-of-law rules. *See Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1002 (9th Cir.1987)* (noting that the Warsaw Convention does not specify which party's internal law is the proper law, but that the problem "is easily resolved in the routine Warsaw Convention case, in which a federal court has diversity jurisdiction"); *id.* ("For many years it has been the rule that a federal court sitting in

diversity applies the conflict-of-law rules of the state in which it sits.").

Under California's choice-of-law rules, "California will decline to apply its own law to a case brought in California only if it is shown that another state has a greater interest in having its law applied." *In re Aircrash in Bali, Indonesia on Apr. 22, 1974, 684 F.2d 1301, 1307 (9th Cir.1982)* (observing that "California has adopted the 'governmental interest' approach to questions of conflicts of laws" and citing *Hurtado v. Superior Court, 11 Cal .3d 574 (1974)*). If the parties do not suggest any other state that would have a greater interest in having its law applied, then a district court sitting in California properly employs California law in resolving the dispute. *See In re Aircrash, 684 F.2d at 1307* (applying California law to an action involving an airplane crash under the Warsaw Convention).

Here, California has a greater interest than any other state in applying its law to protect and compensate Californians who are the victims of conduct leading to wrongful deaths. These parties never raised a choice of law issue, and they agreed throughout the litigation—and again when this Court asked them for guidance after issuing its Amended Findings—that California substantive law governs the dispute. Thus, the Court will apply California law regarding the recovery of non-economic losses in a wrongful death action.

Under California damages law, non-pecuniary losses may be awarded. Survivors in a wrongful death claim are entitled to both economic and non-economic losses. *See* BAJI No. 14.50 (8th ed.1994) (instructing that a jury may award "economic and non-economic" damages); *Krouse v. Graham, 19 Cal.3d 59, 67 (1977)* (establishing that a plaintiff may recover for non-pecuniary damages in an action for wrongful death); *id.* (noting that "for the

past century California courts have uniformly allowed wrongful death recovery for loss of the society, comfort, care and protection afforded by the decedent").

The defendant does not dispute that California law applies to this suit, nor does it contend that California law forbids recovery for non-pecuniary losses. Instead, the defendant asserts that the Court's statement that the parties had not established that damages in excess of the plaintiffs' pecuniary loss were legally appropriate meant that the Court had concluded that non-economic damages were not warranted, or at least that its damage award included both pecuniary and non-pecuniary losses.

The defendant's interpretation of the Amended Findings is in error. This Court did not mean to imply that the plaintiffs had not suffered non-economic losses, or that its award incorporated both pecuniary and non-pecuniary damages. Instead, the Court meant simply what it said: that the parties had not at that time established the legal framework under which this Court could determine whether an award of non-economic loss was appropriate. By agreeing that Dr. Hanson died over Germany and that therefore California substantive law applies (as opposed to the Death on the High Seas Act), the parties have now established the proper legal basis on which this Court may decide whether and to what extent to award damages for the plaintiffs' non-pecuniary loss.

II. THE AWARD OF NON-ECONOMIC DAMAGES

California's model jury instructions direct a jury to award "reasonable compensation for the loss of love, companionship, comfort, affection, society, solace or moral support, any loss of the enjoyment of sexual relations, and any loss of the physical assistance to a spouse in the operation or maintenance of the home." *See* BAJI

No. 14.50 (unnecessary brackets omitted). Moreover, the instructions indicate that the fact-finder is not to consider any pain or suffering of the decedent, any grief or sorrow of the heirs, or the poverty or wealth of any heir. *See id.* The Court must diminish any recovery in proportion to Dr. Hanson's comparative negligence. *See id.* (Use Note (citing 6 Witkin, Summary of Calif. Law (9th ed.), Torts, § 1214).

In responding to this Court's request for guidance regarding an appropriate amount for non-economic damages, the parties have (perhaps not surprisingly) produced quite disparate figures. The defendant asserts that Isaac and Sarah Husain will be financially independent in the near future and did not suffer "any exceptional non-economic loss." Defendant's Letter Brief, Nov. 17, 2000, at 1. The defendant also contends that the evidence in the record does not support an award of non-economic damages to Hannah Husain. *See id.* The defendant cites a single case, *Huey v. Carteron,* 1997 WL 465515 (T.D. Cal.Jury), in which a 45-year-old businessman was survived by his 48-year-old widow and his two sons, aged 18 and 17. In *Huey,* which involved a medical malpractice claim, the jury awarded only $64,000 in special damages. As a result, the defendant contends, the plaintiffs are entitled to non-economic damages in the range of $75,000 to $100,000.

The plaintiffs argue that this Court's non-economic award should be several times its award for economic damages. In addition to outlining in great detail the evidence indicating that the plaintiffs suffered non-economic losses, the plaintiffs have also cited studies regarding the importance of paternal involvement in a child's development. *See* Plaintiffs' Letter Brief, Nov. 21, 2000, at 2-5 (citing portions of the trial transcript to demonstrate the plaintiffs' non-economic losses); *id.* at

4 (citing studies regarding a father's role in a child's life). The plaintiffs have also identified cases in which the awards for non-economic losses ranged from $3,750,000 to $7,500,000. *See id.* at 9 (citing six cases). The plaintiffs assert that awards for non-economic damages are typically several times the corresponding awards for economic damages because "non-economic loss is far more devastating to surviving family members because it is a loss that can never be replaced." *Id.* at 5. In the plaintiffs' view, $4,000,000 to $6,000,000 is a more appropriate figure to compensate the plaintiffs.

The plaintiffs did present evidence regarding the non-economic loss they suffered as a result of Dr. Hanson's death. Rubina Husain, married to Dr. Hanson for twenty years at the time of his death, described in her testimony the activities the family used to do together for recreation. *See* Transcript of Bench Trial ("Transcript"), Vol. 1 (May 30, 2000), at 69-70 (testimony of Rubina Husain). She also indicated that Dr. Hanson was active around the house and helped her with chores such as gardening and cleaning. *See id.* at 73. Isaac Husain testified that Dr. Hanson "was a very caring father and a very loving father." Transcript at 142 (testimony of Isaac Husain) (observing that one of Dr. Hanson's "principal avocations and pleasures in life is [sic] his role as a father"). Isaac Husain also recounted the interest that Dr. Hanson took in the Husain children's lives, and the time they all spent together talking, taking trips, and attending athletic events. *See id.* According to Isaac Husain, Dr. Hanson and Rubina Husain had a very close relationship and worked together in raising the three Husain children. *See id.* at 142-43. Finally, in her testimony, Sarah Husain depicted a typical day in her family's life and commented on the importance of her father to the family. *See* Transcript, Vol. II (May 31, 2000), at 336-337 (testi-

mony of Sarah Husain). She also discussed the chores that her father performed around the house, his attendance at the children's activities, the assistance he provided to her in applying for college, and the closeness of his relationship with the Husain children. *See id.* at 337-43.

It is, of course, difficult to attach a specific monetary figure to the value of a father to his wife and three children. In addition to the parties' letter briefs, this Court also performed its own review of verdicts from other wrongful death cases in California for guidance. Many cases awarded well over one million dollars in non-economic damages for the surviving spouse and minor children of a decedent. *See, e.g., Hoskins v. Vintage Petroleum Inc.*, 1998 WL 1108100 (T.D. Cal. Jury) (awarding after a bench trial $2 million in non-economic damages for the wife and two minor children of a decedent killed by toxic gases); *Thomas v. L.A.P.D.*, 1995 WL 766087 (T.D. Cal.Jury) (awarding $1.5 million in non-economic damages for the wife and two minor children of a shooting victim); *Passoff v. Robinson Helicopter Co.*, 1994 WL 846769 (T.D. Cal.Jury) (awarding $3 million in non-economic damages for the wife and two minor children of a decedent killed in a helicopter crash).

A few cases awarded less than one million dollars for non-economic damages to a surviving spouse and minor children. *See, e.g., Balanay v. Knoll,* 1999 WL 504676 (T.D. Cal.Jury) (awarding $250,000 in non-economic damages to the husband and three children of a decedent); *Thompson v. Asbestos Corp. Ltd.*, 1998 WL 389414 (T.D. Cal. Jury) (awarding between $400,000 and $800,000 in non-economic damages to the surviving spouses and children of asbestos victims).

After analyzing all of these verdicts and carefully considering the importance of Dr. Hanson to his family, the Court has concluded that the plaintiffs should receive an award of non-economic damages equal to this Court's earlier award for economic damages. Dr. Hanson was actively involved in his children's lives and provided comfort, support, and physical assistance to his wife, but he enjoyed less-than-perfect health. The plaintiffs are undoubtedly entitled to more than the $100,000 suggested by the defendant, and awarding non-economic damages equal to the family's economic damages seems reasonable and fair.

As a result, the Court concludes that the plaintiffs are entitled to non-economic damages of $1,400,000. The Court then must reduce that figure by fifty percent to account for Dr. Hanson's contributory negligence, for a total additional award of $700,000. Thus, the Court's total award, including its earlier award for the plaintiffs' pecuniary loss, is $1,400,000.

CONCLUSION

For the foregoing reasons, the Court supplements its earlier Amended Findings by awarding the plaintiffs an additional $700,000 in non-pecuniary damages.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
N.D. CALIFORNIA

No. C 99-1400 CRB

October 3, 2000

RUBINA HUSAIN, individually and as personal representative of the estate of Abid M. Hanson, M.D.; Hannah Husain; Sarah Husain and Isaac Husain, minors, by and through their Guardian ad Litem, Rubina Husain,

Plaintiffs,

—v.—

OLYMPIC AIRWAYS,

Defendant.

GERALD C. STERNS, Sterns & Walker, Oakland, CA, *for Plaintiffs*.

STEPHEN J. FEARON JR., ROBERT J. SAVILLE, Condon & Forsyth LLP, Los Angeles, CA, JOHN MAGGIO, Condon & Forsyth, New York City, *for Defendant*.

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

BREYER, *District Judge*.

On an international passenger flight in January 1998, Dr. Abid M. Hanson, a non-smoker who suffered from asthma, inhaled a significant amount of second-hand smoke and died in the company of his wife and three children. Dr. Hanson was not seated in the "smoking" section of the airplane on which he died, but in a seat three rows ahead. Considerable ambient smoke was present at this location. Had Olympic Airways' flight crew responded appropriately to the repeated requests to move Dr. Hanson from this area, he might be alive today.

Plaintiffs Rubina, Hannah, Sarah and Isaac Husain bring this wrongful death action under the liability provisions of the Warsaw Convention. The parties agree that the Warsaw Convention presents plaintiffs' exclusive remedy. Therefore, to determine liability in this case, the Court must decide whether plaintiffs' claim satisfies the requirements of that treaty. Specifically, the Court must decide: (1) whether an "accident" occurred aboard Olympic Airways Flight 417 on January 4, 1998; (2) whether that accident caused the death of Abid Hanson; (3) whether the crew's in-flight actions constituted "willful misconduct"; and (4) to what extent, if any, Dr. Hanson's own negligence contributed to his death.

Plaintiffs filed this suit in state court on December 24, 1998, and defendant removed the case to this Court on March 23, 1999. The Court heard testimony and received evidence in this case on May 30, May 31, and June 1, 2000.[1] After receiving the parties' post-trial briefs, the

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[1] The Court's subject matter jurisdiction over Olympic Airways derives from the Foreign Sovereign Immunities Act, which provides only for non-jury civil actions. *28 U.S.C.A. § 1330(a), 1605.*

Court heard final arguments on July 20, 2000. Supplemental letter briefs were submitted shortly thereafter. This memorandum and order shall constitute the Court's findings of fact and conclusions of law in this matter.

FACTUAL BACKGROUND

I. Dr. Hanson's Medical History

Dr. Abid Hanson was 52 years old in January 1998. For more than two decades prior to his death, Dr. Hanson suffered from asthma. Although Dr. Hanson did not receive regular treatment for his condition, he carried a Proventil/Albuterol inhaler on his person most of the time to assist his breathing. According to the testimony of Dr. Hanson's wife, Ms. Rubina Husain, Dr. Hanson used his inhaler more and more frequently as he aged. Perhaps as a result of his asthmatic condition, Dr. Hanson was particularly sensitive to second-hand cigarette smoke, and he generally tried to avoid smoke-filled areas. Prior to January 4, 1998, Dr. Hanson had never been affected by cigarette smoke during domestic or international air travel.

In addition to his asthma, Dr. Hanson suffered from multiple food allergies. The evidence is somewhat unclear regarding the extent of Dr. Hanson's allergies, or even the particular foods to which he was allergic. A blood test prior to his death indicated that Dr. Hanson was allergic to grapes, yeast and tomatoes. However, Dr. Hanson frequently ate tomato-based dishes at home without incident.

In the two years preceding Dr. Hanson's death, he suffered two notable medical emergencies of unknown origin. In each instance, the incident may have been precipitated by Dr. Hanson's asthma or by an allergic reaction to certain foods. The most serious incident

occurred during a family vacation in Las Vegas in December 1996. One evening, Dr. Hanson and his wife spent approximately ten minutes in a smoky restaurant, shared some cheese pizza and a piece of quiche, and returned to their hotel room. Shortly thereafter, Dr. Hanson began to have trouble breathing. As his breathing difficulties worsened, Dr. Hanson began to turn blue. Ms. Husain performed CPR until the paramedics arrived, at which point Dr. Hanson was administered a shot of epinepherine, a form of adrenaline. After resuscitating Dr. Hanson, the paramedics moved him to the hospital, where he was held overnight. The next morning, Dr. Hanson checked himself out of the hospital against medical advice.

The precise cause of Dr. Hanson's near-fatal experience in Las Vegas is not entirely clear. Although the dry Nevada air or the smoke of the restaurant may have triggered the attack, it was more likely caused by a reaction to certain foods. After reviewing Dr. Hanson's medical records, Dr. Stephen Wasserman, defendant's expert witness, described Dr. Hanson's troubles in Las Vegas as anaphylaxis caused by a severe allergic reaction to food. Plaintiffs' expert, Dr. Jeffrey Golden, agreed, characterizing the episode as "bona fide food-related anaphylaxis."

After the incident in Las Vegas, Dr. Hanson purchased an emergency carrying case containing epinepherine to treat any future attacks. Shortly thereafter, Dr. Hanson experienced a second medical crisis in the summer of 1997, at the home of a friend in Alameda, California. On the evening in question, Dr. Hanson had eaten dinner and then taken a walk outside. Upon Dr. Hanson's return, Ms. Husain noticed that he was having trouble breathing. Fearing that her husband was suffering an asthma attack, Ms. Husain called the paramedics. When they arrived,

the paramedics administered oxygen and observed Dr. Hanson for about ten minutes, but did not take him to the hospital. No epinepherine was administered on that occasion.

The cause of Dr. Hanson's breathing problems in Alameda are unknown. Although defendant posits that this second incident was food-related, there is no evidence to support that hypothesis. Equally likely is that the cold dry air which Dr. Hanson breathed during his walk triggered an asthmatic reaction. In either case, the incident in Alameda reveals little about the cause of Dr. Hanson's death aboard Flight 417 six months later.

II. Dr. Hanson's Death

In late 1997, Dr. Hanson, his wife, Rubina Husain, and their three children ("the Husains") traveled from San Francisco to Athens and Cairo for a family vacation. They were accompanied on their trip by family friends, Dr. Umesh Sabharwal, his wife and their children.

Prior to arriving at the airport, the Husains were unaware that Olympic Airways ("Olympic") permitted passengers to smoke cigarettes on international flights. Upon learning for the first time at the New York airport that their flight would include a smoking section, the Husains requested non-smoking seats. On the 12-hour flight from New York to Athens, the Husains were seated toward the middle or front of the aircraft. On the connecting flight to Cairo, the Husains were again seated away from the smoking section of the cabin. No ambient smoke was present at either location. Dr. Hanson experienced no problems breathing on either flight.

The Husain family spent 12 days in Egypt, and embarked on their return trip to the United States on January 4, 1998. According to the testimony of Ms. Husain, the family arrived at the airport early on the day of the

return flight because they wanted to ensure that they would be seated in the non-smoking section. After receiving the family's seat assignments, Ms. Husain returned briefly to the counter and showed the check-in agent a letter signed by Dr. Hanson's brother, also a medical doctor, explaining that Dr. Hanson had a history of asthma. After showing the letter to the agent, Ms. Husain asked the agent to ensure that the family would be seated in the non-smoking section of the plane.

The first leg of the family's return trip was uneventful, but Dr. Hanson began to experience some breathing trouble during a layover in the Athens airport. The layover in Athens lasted approximately three to four hours, and the large room in which the family was seated was filled with cigarette smoke. During the delay, Dr. Hanson used his inhaler more frequently than usual. Because he was bothered by the pervasive smoke, Dr. Hanson attempted to move into the restricted but slightly less smoky area of the first class lounge, but airport officials asked that he move back to the main room.

After the delay, the Husains and the Sabharwals boarded Olympic Airways Flight 417. It was at this time that the Husains first realized that they had been assigned seats at the rear of the airplane cabin, only a few rows in front of the smoking section. The airplane, a Boeing 747, contained a total of 426 passenger seats in 56 rows. Rows one through 13 were designated as business class seats, and rows 14 through 56 were designated as economy class seats. In the economy class, rows 14 through 50 were designated as non-smoking seats. The economy class smoking section began at row 51 and extended to the rear of the cabin. The Husains were seated in row 48 in seats A through E. The Sabharwals were seated nearby. Dr. Husain was seated in seat 48E, just three rows in front of the smoking section. No

partition separated the smoking from the non-smoking section.

When the Husains arrived at their seats, Ms. Husain noticed Maria Leptourgou, an Olympic flight attendant, circulating in the cabin and advising passengers to sit down for takeoff.[2] Ms. Husain approached Ms. Leptourgou and told her that her husband could not sit in a smoking area. Ms. Husain said to Ms. Leptourgou, "You have to move him." The flight attendant paid little attention to Ms. Husain's request, telling her to "have a seat."

Once the plane was fully boarded, but prior to takeoff, Ms. Husain again approached Ms. Leptourgou and asked the flight attendant to move her husband now that all the passengers on the plane were seated. This time Ms. Husain explained that her husband was "allergic to smoke." At trial, Ms. Husain described her pre-takeoff requests to the flight attendant as "adamant." Ms. Leptourgou replied that she could not transfer Dr. Hanson to another seat because the plane was "totally full." The flight attendant also told Ms. Husain that she was too busy at the moment to assist the Husains.[3]

The Husains remained in their assigned seats during takeoff, and the first several minutes of the flight passed

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[2] Because Ms. Leptourgou was unavailable to testify at trial and was not deposed for the purpose of this case, the Court never heard her recollection of the events leading up to Dr. Hanson's death. In making its factual findings the conversations between Ms. Husain and the flight attendant, the Court must rely primarily on the testimony of Ms. Husain. The Court finds Ms. Husain's testimony to be quite credible, and notes that her recollection of the events on Flight 417 was largely corroborated by the testimony of Dr. Sabharwal and her children, Isaac and Sarah Husain, as well as much of the uncontradicted evidence.

[3] Defendant objects to Ms. Husain's testimony regarding this conversation, arguing that the statements attributed to Ms. Leptourgou are inadmissible hearsay. The Court permitted the testimony at

without incident. Shortly after takeoff, however, the captain turned off the "no smoking" signs, and passengers in the rows behind the Husains began to light cigarettes. From this point on, according to the testimony of Sarah Husain, passengers in rows 51 through 56 were smoking continuously. In addition to those seated in rows 51 through 56, a number of passengers from other rows stood temporarily in the aisles behind the Husains, smoking and socializing. As a result, smoke was both pervasive and constant.

As soon as the smoking began, the Husains were surrounded by ambient smoke which had floated forward into their row. When the smoke began to linger in row 48, Dr. Hanson gestured to his wife and complained that the smoke was "like a chimney." Ms. Husain then stood up and contacted Ms. Leptourgou for a third time. This time, Ms. Husain told the flight attendant, "You have to move my husband from here." Again, Ms. Leptourgou curtly refused, stating that the plane was full. Ms. Leptourgou indicated to Ms. Husain that Dr. Hanson could switch seats with another passenger, but that, in order to do so, Ms. Husain would have to walk through the cabin and ask other passengers herself. She could not enlist the assistance of the flight crew in changing her husband's seat. Ms. Husain, becoming more desperate

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trial, subject to later consideration of the hearsay question. After due consideration, the Court overrules defendant's objection. Ms. Leptourgou's statements were not offered for their truth, and are therefore not hearsay. *See Fed.R.Evid. 801*. Indeed, plaintiff charges, and the Court finds, that Ms. Leptourgou's statements were in fact untrue. The statements establish not that Flight 417 was full or that the crew was unable to move Dr. Hanson, but that Ms. Leptourgou failed to respond appropriately to Ms. Husain's concerns and entreaties. Moreover, even if the statements were admitted only for their truth, they would still likely be admissible as vicarious admissions of a party-opponent. *See Fed.R.Evid. 801(d)(2)*.

and more adamant, told the flight attendant that her husband *had* to move, even if the only available seat were in the cockpit or the first class area of the cabin. The flight attendant, however, was equally resolute. She offered no assistance. Finally, Ms. Husain seeing no hope for accommodation, returned to her seat.

Unbeknownst to the Husains, Flight 417 was actually not full. In fact, the flight contained eleven empty passenger seats.[4] The cabin had a capacity of 426 seats, 44 of which were located in business class and 382 of which were located in economy class. Four of these seats, located in a row immediately behind the smoking section, were designated as "crew rest" seats. Only 411 passengers traveled on Flight 417 on January 4. Therefore, the flight had eleven unoccupied seats, not including those designated for crew rest. Two of those empty seats were located in the business class section of the cabin.

In addition to the unoccupied seats, Flight 417 carried 28 "non-revenue passengers." Non-revenue passengers include employees and relatives of employees of Olympic Airways and other airlines. Of these 28 passengers, eleven were seated in the cabin's smoking sections. Of the remaining 17 non-revenue passengers, two were seated in rows one and two in business class and 15 were seated in rows 15 through 36 in economy class.

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[4] There was some confusion at trial concerning the number of empty seats and how many of them were located in the non-smoking section of the plane. The Court's finding that there were eleven empty seats on the flight is supported by the flight's passenger manifest, the testimony of Captain Karayannis, and Olympic's admissions during discovery. Unfortunately, the evidence did not establish the precise location of these seats on the plane or how many of them were located in the non-smoking section.

As the flight progressed, ambient smoke continued to circulate in the area of row 48. Approximately two hours into the flight, the crew served a meal. The evidence before the Court establishes that Dr. Hanson ordered a meal and that he ate some portion of it. He also shared some of his food with his daughter, Sarah, and with a woman seated to his right. According to Sarah, Dr. Hanson "wasn't really eating that much" of his meal.

Immediately after the meal service, smoking increased noticeably in the rows behind the Husains. Around this time, Dr. Hanson became unusually quiet. At some point shortly after the meal, Dr. Hanson asked his wife for a new inhaler, indicating that the one he had been using had emptied. Ms. Husain retrieved a full inhaler from the overhead bin. Dr. Hanson turned around several times to look at the smoke in the rows behind him. He then told Sarah that the smoke was bothering his allergies, and decided to move toward the front of the cabin to breathe fresher air.

Sarah notified her mother of Dr. Hanson's discomfort, and Ms. Husain followed him to the front of the aircraft. Dr. Hanson walked forward a number of rows, stopping in the galley area between rows 19 and 20, well into the non-smoking area. When Ms. Husain reached him, he was leaning against a chair near the galley area. Dr. Hanson gestured to Ms. Husain to get the epinepherine that he carried in his emergency kit, which Ms. Husain had stored in a carry-on bag. Ms. Husain rushed to the rear of the plane to retrieve the epinepherine, then returned to the galley area and administered a shot to her husband in a pre-measured syringe.[5] She then ran to the rear of the cabin to wake Dr. Sabharwal.

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[5] The parties agree that the epinepherine administered to Dr. Hanson on Flight 417 was fresh and had been properly maintained.

Within seconds, Dr. Sabharwal, who, by chance, was an allergy specialist, arrived at the front of the plane to assist. Noticing that Dr. Hanson was in respiratory distress, Dr. Sabharwal pulled him onto the floor, gave him another shot of epinepherine (.20 ccs), and began to administer CPR.[6] At this point, Dr. Hanson's pulse was barely palpable. Dr. Sabharwal noticed that, while Dr. Hanson's lower airways were obstructed, his upper airway was not. For this reason, he was able to push some air into Dr. Hanson's lungs during the administration of CPR. During the treatment, Dr. Sabharwal also gave Dr. Hanson a shot of Bricanyl, which had been retrieved from the Husains' emergency kit.

At some point during this period, Ms. Husain requested that one of the flight attendants provide an oxygen canister and mask for her husband. According to Ms. Husain's testimony, two flight attendants attempted to open the oxygen canister, but were unable to do so.[7] Ms. Husain summoned Sarah, who was walking toward the front of the aircraft, and asked her to retrieve Dr. Hanson's oxygen canister with its nasal canula from the family's emergency kit. Sarah relayed this message to

[6] Although it is not entirely clear exactly how many shots of epinepherine Dr. Hanson received during the trauma that preceded his death, the testimony of Dr. Sabharwal, Ms. Husain, Isaac Husain and Sarah Husain confirm that at least two shots were administered, the first by Ms. Husain and the second by Dr. Sabharwal.

[7] The testimony regarding oxygen administration was entirely contradictory. Rubina and Isaac Husain both testified that the flight attendants were arranging an oxygen canister, but that they were unable to administer oxygen to Dr. Hanson. Ms. Husain, Dr. Sabharwal and Olympic flight attendant Eleni Xourgia all testified that Dr. Hanson was administered oxygen at some point during the incident with equipment obtained from the Husains' emergency kit. Theocharis Fotiades and Nikolaos Belkas testified that oxygen was supplied through Olympic's canister and mask.

her brother, Isaac, who brought the oxygen to Ms. Husain.

As they attempted to resuscitate Dr. Hanson, Dr. Sabharwal and Ms. Husain administered oxygen through a nasal canula. In addition, oxygen may have been administered through Olympic's canister with an attached mask. However, because Dr. Hanson was not able to breathe spontaneously, Dr. Sabharwal determined that the oxygen was not useful. About five minutes after Dr. Sabharwal arrived on the scene, the Olympic flight crew brought him a medical kit. By this point, however, Dr. Sabharwal believed that only a fully-equipped medical crash kit could save Dr. Hanson's life.

As time passed, a few other passengers arrived in the galley to assist Dr. Sabharwal, but no one was able to save Dr. Hanson. At approximately 4:40 p.m. Greenwich Mean Time, Dr. Sabharwal announced that Dr. Hanson had died.

During the entire incident, the airplane's captain never turned on the "no smoking" sign or otherwise requested that the passengers in the rear of the plane stop smoking.

III. The Medical Causes of Dr. Hanson's Death

For religious reasons, no autopsy was performed on Dr. Hanson's body after his death, and the direct cause of his fatal attack is a matter of some dispute. Plaintiffs argue that Dr. Hanson's death was caused by a severe asthma attack brought on by inhalation of cigarette smoke. Defendant, on the other hand, argues that Dr. Hanson died as a result of anaphylaxis caused by an allergic reaction to food, or that he died as a result of some other unknown medical problem. As discussed below, the Court finds that plaintiff has established by a preponderance of the evidence that smoke ingestion dur-

ing the first two hours of Flight 417 was a primary cause of Dr. Hanson's death.

Anaphylaxis is an allergic emergency which may be caused by an allergy to external material. Symptoms of anaphylaxis include skin discoloration, obstruction of the upper airway, disturbance in the intestinal tract, drop in blood pressure, shock or rapid, ineffective heartbeat. An asthmatic attack, on the other hand, is a reversible narrowing of the airway caused by air pollutants or other irritants, such as cigarette smoke.

The symptoms of asthma and anaphylaxis overlap significantly. Indeed, some severe asthma attacks may be characterized as anaphylactic reactions. In this case, the course of events with respect to the timing of the meal, Dr. Hanson's smoke inhalation, and the onset of his reaction support theories labeling the cause of death as both anaphylaxis and asthma. Both anaphylaxis and asthma attacks produce the same symptoms in the lower airway. Either can result in death. Epinepherine can be used to treat both anaphylaxis and asthma, but it is not necessarily efficacious in either case. The fact that Dr. Hanson received two or more injections of epinepherine during the flight and that the drug had no effect does not assist the Court in arriving at a cause of death.

Although anaphylaxis and asthma are sometimes difficult to differentiate, the Court finds that smoke played a significant causal role in Dr. Hanson's death. As both Dr. Golden and Dr. Wasserman acknowledged, cigarette smoke can act as an irritant. Moreover, the greater an individual's exposure to smoke, both in terms of time and intensity, the greater the irritant effect. As Dr. Golden explained in his testimony before the Court, the presence of an irritant can cause bronchospasm, constricting an individual's airways.

The Court finds significant the testimony of the Husain family and Dr. Sabharwal regarding Dr. Hanson's behavior in the Athens airport. During the hours-long delay in Athens, Dr. Hanson used his inhaler frequently and was increasingly bothered by the prevalent smoke. To escape the effects of the smoke, Dr. Hanson illicitly entered the first class lounge, where the air quality was slightly better. Dr. Hanson's problems in Athens indicate his sensitivity to smoke on the day in question.

Once the family was airborne toward New York on Flight 417, but prior to the in-flight meal service, Dr. Hanson again complained about the smoke. During the first hours of the flight, Dr. Hanson used his inhaler to remedy the effects of the smoky air while aboard the plane.[8] The Court cannot credit defendant's suggestion that Dr. Hanson's breathing problems prior to the meal were causally unrelated to his later asphyxiation. The evidence before the Court suggests exactly the opposite conclusion. Dr. Hanson explicitly complained that smoke was affecting his breathing just hours before his death, complained to his wife about the level of cigarette smoke on the plane, and relied extensively on his inhaler for support during the hours leading to his fatal attack. To conclude, as defendant urges, that the smoke on Flight 417 did not trigger Dr. Hanson's death is to ignore the chain of events leading up to his attack.

Defendant introduced evidence at trial to establish that Dr. Hanson may have died as a result of an anaphylactic

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[8] Although the Court heard no direct evidence that Dr. Hanson used his inhaler on the flight, the evidence shows that he was bothered by the smoke, and that he asked his wife for a new inhaler because the inhaler in his possession had become empty. In light of the fact that Dr. Hanson frequently relied on his inhaler to remedy the adverse effects of ambient smoke, the Court finds that he used his inhaler while aboard Flight 417.

reaction to yeast, tomatoes or grapes in the in-flight meal. This contention is belied by several facts in the record. First, there is no evidence that Dr. Hanson ate any grapes, tomatoes or bread-based products on the flight. In fact, the only credible evidence regarding Dr. Hanson's food intake was the testimony of his daughter, Sarah. According to Sarah, Dr. Hanson received a meal on the flight, but did not eat the whole thing, and in fact shared it with both of his neighbors. No witnesses testified that they observed Dr. Hanson eating any of the foods to which he was allergic while seated in row 48. Without further evidence of Dr. Hanson's sensitivities and his food intake aboard the flight, the Court cannot conclude that his death was caused by a reaction to the food.

Further, Dr. Hanson's death lacked certain symptoms that frequently appear in cases of anaphylaxis. Anaphylaxis caused by oral injection of an allergen commonly causes swelling in the upper airway. In this case, Dr. Sabharwal observed that Dr. Hanson's upper airway was not obstructed. Anaphylaxis frequently, but not always, causes discoloration, redness and hives on a victim's chest and neck. Dr. Sabharwal noticed none of those symptoms in this case.

Moreover, the testimony of Dr. Sabharwal, the only doctor who actually treated Dr. Hanson during his trauma, supports the Court's conclusion. While Dr. Sabharwal testified that he could not definitively diagnose the cause of Dr. Hanson's death, he did offer a differential diagnosis, assessing the likely causes of death in order of their probability. Dr. Sabharwal opined that, in light of Dr. Hanson's asthma and the obstruction of Dr. Hanson's airways, he most likely died as a result of status asthmaticus, or "totally uncontrolled asthma." The second most likely cause of death, according to Dr. Sabharwal, was anaphylaxis, and the third was "cardiac problems." Failing each of these potential causes, Dr.

Sabharwal concluded that Dr. Hanson's death may have been precipitated by unknown causes.

Dr. Golden's testimony further supports the Court's factual findings regarding the cause of Dr. Hanson's death. Dr. Golden testified that, in the absence of food, the only possible cause of death in this case would be an asthmatic reaction. Because Dr. Hanson may have eaten some of his meal, Dr. Golden concluded that it is difficult to distinguish whether Dr. Hanson's condition was anaphylaxis or asthma. However, Dr. Golden was able to conclude that smoke was a significant contributing factor in Dr. Hanson's death, regardless of whether he ate a meal on Flight 417.

Dr. Wasserman, defendant's expert witness in this case, attributed Dr. Hanson's death to asphyxiation or heart failure brought on by a reaction to an allergen, possibly tomatoes or yeast. Even Dr. Wasserman acknowledged, however, that cigarette smoke may have contributed to Dr. Hanson's death, although he was unable to determine the extent of that contribution.

In conclusion, the Court finds that Dr. Hanson's death was the result of respiratory distress which was caused by an exacerbation of his asthmatic condition due to the prolonged and extensive exposure to second-hand smoke on Olympic's Flight 417.

DISCUSSION

I. Applicable Law: The Warsaw Convention

This case is governed by the provisions of the Warsaw Convention[9] ("the Convention"). The Convention is a comprehensive international treaty governing the lia-

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[9] The Warsaw Convention is the popular name for the Convention for the Unification of Certain Rules Relating to International

bility of carriers in "all international transportation of persons, baggage or goods." *49 U.S.C. § 40105*. The purposes of the Convention were to achieve uniformity and to limit the liability of air carriers. *See El Al Israel Airlines v. Tseng, 525 U.S. 155, 119 S.Ct. 662, 671-72, 142 L.Ed.2d 576 (1999)*; *Carey v. United Airlines, Inc., 77 F.Supp.2d 1165, 1169 (D.Or.1999)*. The parties agree that, because Dr. Hanson's death occurred during international travel, the Convention provides plaintiffs' exclusive remedy. *See Tseng, 119 S.Ct. at 668*. ("[R]ecovery for a personal injury suffered 'on board [an] aircraft or in the course of any of the operations of embarking or disembarking,' if not available under the Convention, is not available at all.").

The Convention provides for strict liability for carriers in certain situations, and precludes liability altogether in others. Article 17 of the Convention explains that a carrier "shall be liable" for death or bodily injuries of passengers sustained during flight as the result of an "accident." Articles 20 and 22 limit a carrier's liability under Article 17 to $75,000 per passenger. However, under Article 25, the $75,000 limitation does not apply if the carrier has committed "wilful misconduct."[10] *See generally Hermano v. United Airlines, 1999 WL 1269187 (N.D.Cal. Dec. 21, 1999)*.

II. The "Accident" Requirement

Article 17 of the Convention provides that

> The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or

Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), note following *49 U.S.C. § 40105*.

[10] This term is more commonly spelled today as "willful misconduct." For the purposes of this memorandum, the Court will use the modern spelling except for direct quotations.

> any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft during the course of any of the operations of embarking and disembarking.

49 U.S.C. § 40105. The Supreme Court has interpreted this language to require the occurrence of an "accident" for a carrier to be held liable under the Convention. *See Air France v. Saks, 470 U.S. 392, 396, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985)*.

In *Saks*, the Supreme Court defined "accident" as "an unexpected or unusual event or happening that is external to the passenger." *Saks, 470 U.S. at 405, 105 S.Ct. 1338*. The Court noted that "accident," as that term is used in the Convention, has a narrower definition than the term "occurrence." *Id. at 398, 105 S.Ct. 1338*. This inquiry is an objective one, and does not focus on the perspective of the person experiencing the injury. *See Gotz v. Delta Airlines, Inc.*, 12 F.Supp.2d 199, 201 (D.Mass.1998). Further, "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident." *Saks, 470 U.S. at 406, 105 S.Ct. 1338*. It is the cause of the injury, not merely the occurrence of the injury, that must qualify as an accident. *See id. at 399, 105 S.Ct. 1338; Gotz, 12 F.Supp.2d at 201*.

Despite these limitations, the Court emphasized that its definition "should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." *Id. at 405, 105 S.Ct. 1338*. Other courts have also concluded that the term "accident" should be "interpreted broadly." *See Carey, 77 F.Supp.2d at 1170*.

The Supreme Court has also explained that, while the "accident" must cause the passenger's injury, it need not be the *sole* causal factor. *Saks, 470 U.S. at 405, 105 S.Ct.*

1338. Rather, because "any injury is the product of a chain of causes," a plaintiff under the Convention need only "prove that some link in the chain was an unusual or unexpected event external to the passenger." *Id. at 406, 105 S.Ct. 1338.*

In this case, plaintiffs posit three specific occurrences aboard Flight 417 that might be construed as "accidents" contributing to Dr. Hanson's death: (1) Ms. Leptourgou's three refusals to move Dr. Hanson to another seat; (2) the flight crew's inability to provide a usable oxygen canister in a timely manner; and (3) and the captain's failure to turn on the "no smoking" sign during Dr. Hanson's attack. As discussed below, the Court concludes that only the first of these occurrences was an "accident" which caused Dr. Hanson's death.

A. *Refusal to Move Dr. Hanson*

Plaintiffs first argue that Ms. Leptourgou's refusal to transfer Dr. Hanson to another row and her failure to follow company procedure was an "unusual" or "unexpected" event. The Court agrees.

The negligent failure of the flight crew to appropriately serve the needs of an ailing passenger can be considered an "accident" under the Convention. *See Fishman v. Delta Air Lines, Inc., 132 F.3d 138, 142 (2d Cir.1998)* (flight attendant negligently spilled scalding water on passenger while attempting to attend to passenger's earache). A claim "does allege an accident if it arises from some inappropriate or unintended happenstance in the operation of the aircraft or airline. Thus, an injury resulting from routine procedures in the operation of an aircraft or airline can be an 'accident' if those procedures or operations are carried out in an unreasonable manner." *Id. at 143; see also Schneider v. Swiss Air Transport Company Ltd., 686 F.Supp. 15 (D.Me.1988)*

(finding possible accident where flight attendant refused to assist passenger by asking other passengers sitting in front of her to raise their seats); *Langadinos v. American Airlines, Inc., 199 F.3d 68, 71 (1st Cir.1999)* (finding possible accident where flight attendant imprudently served alcohol to a passenger whose behavior was already "erratic" and "aggressive"); *Carey, 77 F.Supp.2d at 1171* (flight attendant's "acts of preventing plaintiff and his children from changing seats, engaging in heated, argumentative exchanges with plaintiff, informing him that he could be arrested if he did not stay in his seat and if his children did not stay in their seats, and publicly humiliating him meet the definition of 'accident' as articulated in *Saks*.").

Defendant argues that no unusual event occurred during the Husains' flight. According to defendant, ambient smoke is an expected and usual aspect of international flying. *See Warshaw v. Trans World Airlines, Inc., 442 F.Supp. 400 (E.D.Pa.1977)* (routine repressurization of cabin was not an accident, even though it caused plaintiff to lose his hearing); *Saks, 470 U.S. at 394, 105 S.Ct. 1338* (routine cabin pressurization during landing is not an accident); *Gotz, 12 F.Supp.2d 199* (injury to passenger during attempt to stow baggage in overhead compartment was not accident, because crew "worked perfectly").

The Court does not dispute that smoke in the cabin may be an expected aspect of international travel. Indeed, it is clear from the record that the Husains knew before boarding that the January 4 flight would have a smoking section. However, defendant's argument misses the mark. The smoke in the cabin was not the "unusual" or "unexpected" event which caused Dr. Hanson's death, although, as detailed above, the smoke undoubtedly had a significant place in the causal chain. Rather, the

unusual and unexpected event on which plaintiffs base their claim was the failure of the flight attendant to adequately respond to Ms. Husain's transfer requests. Indeed, in both *Warshaw* and *Gotz*, in which the courts found that injuries not attributable to unusual aircraft operations were not actionable under the Convention, the courts specifically mentioned that the injured passengers had *failed to request assistance from the flight crew.* In this case, the opposite is true. With increasing urgency, Ms. Husain three times requested the crew's assistance prior to her husband's death, and her request was thrice denied.

Under no reasonable interpretation of the facts can one conclude that Ms. Leptourgou's failure to assist Dr. Hanson was expected orusual. The Court has heard extensive testimony on the standard of care for flight attendants in situations such as this, and concludes that Ms. Leptourgou acted in an unexpected and unusual manner in several respects.

First, the recognized standard of care for flight attendants during international air travel demands that a flight attendant make efforts to accommodate a passenger who indicates that he or she needs to be moved for medical reasons. In this case, despite Ms. Leptourgou's repeated statements that the flight was full, eleven seats stood unoccupied. The Court can conceive of no acceptable reason for Ms. Leptourgou's refusal to assist Dr. Hanson after Ms. Husain's second and third requests. Moreover, according to Diane Fairechild, a flight attendant with 21 years of experience in international travel, even if the flight had no empty seats in the economy section, the crew should have transferred Dr. Hanson to an empty seat in the business class section of the cabin. Notably, Ms. Husain's suggestion to this effect during her third plea for a seat change went unheeded by Ms. Leptourgou.

Ms. Xourgia, now a chief cabin attendant working for Olympic, testified that, if she were in Ms. Leptourgou's position at the time of Ms. Husain's third request (i.e., after takeoff, when smoking had commenced in row 51), she would have transferred Dr. Hanson "immediately." Ms. Fairechild, testified that, according to recognized industry standard of care, Ms. Leptourgou "should have absolutely responded" to Ms. Husain's requests.

Second, even if the flight were entirely full, the flight attendant should have attempted to move Dr. Hanson. Ms. Fairechild testified that, when faced with a medical request like Ms. Husain's during a full flight, the crew will often attempt to entice other passengers to switch their seats. In this case, a seat transfer would not have been difficult to effectuate, considering that 17 passengers seated in the cabin's non-smoking section were "non-revenue" passengers. The evidence reveals that such a transfer would be appropriate under the controlling standard of care. Even Theocharis Fotiades, the chief cabin attendant on Flight 417, explained that Ms. Leptourgou should "definitely" have attempted to find another seat for Dr. Hanson when Ms. Husain made her requests.

Third, not only did Ms. Leptourgou's failure to act violate the accepted industry standard of care, it also violated Olympic Airways' policy. As Mr. Fotiades testified at trial, Olympic crew members generally make efforts to move passengers who become ill during flights if moving those passengers will assist in their recovery. Mr. Fotiades explained that this policy applies when a passenger must be moved because of smoke-related illness. Further, according to Mr. Fotiades, Olympic flight attendants are familiar with this policy Ms. Leptourgou, however, entirely ignored it. Such behavior cannot be considered either expected or usual.

Fourth, even if Ms. Leptourgou did not personally assist Dr. Hanson to find a new seat, Olympic policy required that she, at least, alert the chief cabin attendant ("CCA") of Ms. Husain's medical requests. Ms. Xourgia testified that as a flight attendant in Ms. Leptourgou's position, she would have immediately contacted the CCA when Ms. Husain requested a seat change prior to takeoff. Although no written policy was placed into evidence by the parties. Ms. Xourgia testified that written Olympic policies require that when a passenger indicates that he needs to be moved for a medical reason, the flight attendant must report that request to the CCA.

In this case, Ms. Leptourgou did not contact the chief cabin attendant to alert him to Dr. Hanson's medical condition or Ms. Husain's requests. In fact, according to the evidence before the Court, Ms. Leptourgou did not contact any other members of the flight crew concerning Ms. Husain's three requests. Nor did she ask another member of the crew whether or not the flight was full. Mr. Fotiades, the chief cabin attendant, did not learn about Ms. Husain's requests for a seat change until after Dr. Hanson had died. Had he learned of the requests earlier in the flight, Mr. Fotiades testified that he would have made further inquiries and attempted to move Dr. Hanson to another seat.

Finally, because of Ms. Husain's precautionary actions in both the New York and the Cairo airports, Ms. Leptourgou's failure to assist Dr. Hanson is even more unexpected and unusual than in the typical case of a passenger transfer request. At the New York airport where the Husains first learned that Olympic permitted smoking on its flights, Ms. Husain informed the check-in agent that her husband was "susceptible to smoke" and could not "be in any smoke." As a result of this initial conversation, the Husains had reason to expect that

Olympic was aware of Dr. Hanson's sensitivity to smoke. This expectation was further bolstered by Ms. Husain's conversation with the check-in agent at the Cairo airport prior to the family's return trip. After the Husains were given their tickets in Cairo, Ms. Husain returned to the counter to ensure that her husband had been given a seat in the non-smoking sections of the two return flights. At that time, Ms. Husain showed the agent a letter from Dr. Hanson's brother explaining that Dr. Hanson had a history of asthma. Again, one would expect that, as a result of this conversation, Olympic was aware of Dr. Hanson's medical needs. In light of this fact, Olympic's subsequent failure to move Dr. Hanson after three requests is even more unusual and unexpected.

Moreover, Dr. Hanson's expectation that Ms. Husain's requests would be accommodated was even more reasonable in light of the normal operating procedures of international carriers. Diane Fairechild testified that medical information and special requests like Ms. Husain's are normally inputted in a "special information log," which is given to the airplane's CCA prior to takeoff. The log serves to inform the CCA of the special needs of the passengers. In this case, despite Ms. Husain's warnings to Olympic check-in agents regarding her husband's condition, nothing to that effect appeared in Olympic's special information log. A passenger in Dr. Hanson's position should expect that medical needs expressed to an agent prior to check-in will be considered once the flight has been boarded. In Dr. Hanson's case, that reasonable expectation was not met.

In sum, Ms. Leptourgou's behavior was far from usual or expected. She violated the industry standard of care, she misrepresented to Ms. Husain that the flight was full, and she acted in contravention of accepted Olympic

Airways policy. This aberrant behavior was both unexpected and unusual.

In the face of this evidence, defendant analogizes to a number of published cases in which the Convention's "accident" requirement was narrowly applied. For instance, defendant relies on *Margrave v. British Airways, 643 F.Supp. 510 (S.D.N.Y.1986)*, in which the district court noted that sitting in "a very cramped position" during a flight delay is neither unusual nor unexpected. The plaintiff in *Margrave* sat in her seat for approximately five hours while her plane waited for takeoff. Because "normal travel procedures" were followed by the crew, the court concluded that no "accident" had occurred. *Id. at 512*. Defendant argues that, under *Margrave*, sitting in an assigned seat cannot be considered an "accident," even if remaining seated causes injury to the passenger. However, *Margrave* is distinguishable from the instant case. In *Margrave*, the plaintiff never told a flight attendant about her discomfort. *Id. at 511*. In contrast, here the unusual event was not Dr. Hanson's seat location, but the flight attendant's refusal to accommodate his needs despite three requests.

Defendant also cites a number of cases in which the crew's failure to assist an ailing passenger was held to not constitute an "accident." For instance, in *Krys v. Lufthansa German Airlines, 119 F.3d 1515 (11th Cir.1997)*, the Eleventh Circuit held that an airplane crew's negligent decision to continue a flight to its scheduled destination despite a passenger's in-flight heart attack was not an actionable "accident" under Article 17. *See also McDowell v. Continental Airlines, 54 F.Supp.2d 1313, 1320 (S.D.Fla.1999)* (reluctantly following *Krys*); *Fischer v. Northwest Airlines, Inc., 623 F.Supp. 1064, 1065 (N.D.Ill.1985)* (refusal to aid passenger with heart attack was not "accident"). *But see*

Seguritan v. Northwest Airlines, Inc., 86 A.D.2d 658, 446 N.Y.S.2d 397, 398-99 (N.Y.App.Div.1982) ("The 'accident' is not the heart attack suffered by the decedent. Rather, it is the alleged aggravation of decedent's condition by the negligent failure of defendant's employees to render her medical assistance.").

The seminal case in this line of "failure to assist" decisions is *Abramson v. Japan Airlines Co., Ltd., 739 F.2d 130 (3d Cir.1984)*. In *Abramson*, the plaintiff was suffering from a preexisting paraesophagael hiatal hernia when he boarded the flight. The plaintiff's condition worsened during the flight, and he asked the flight attendant if he could lie down in empty seats so that he could apply a useful "self help" remedy which included massaging his stomach and occasionally inducing vomiting. *Id. at 131*. The court found that no accident had occurred because the aggravation of the passenger's injury was not an unusual or unexpected occurrence. *Id. at 132*. The court noted that "[i]n the absence of proof of abnormal external factors, aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an 'accident' within the meaning of Article 17." *Id. at 133*.

Each of these cases, including *Abramson*, is distinguishable from the one at bar. Unlike Dr. Hanson, the passengers in each of the cited cases suffered an injury as a result of entirely "internal" forces. While the inaction of the crew may have aggravated the passengers' injuries, it did not precipitate the injuries as such. Here, on the other hand, the flight attendant's failure to transfer Dr. Hanson—or her failure to at least follow the proper procedures—*precipitated* Dr. Hanson's injury and death. *See Fishman, 132 F.3d at 141-142* (distinguishing *Abramson* and *Fischer* on similar grounds).

Additionally, none of the cases cited by defendant arose from a crew member's blatant disregard of industry standards and airline policies. As described above, the testimony in this case indicates that Ms. Leptourgou's actions were anything but usual. When a passenger boards an airplane, he or she should be able to expect that the flight crew will comply with accepted procedures and rules. A failure to do so is unexpected.

Finally, to the extent that any of defendant's cited cases are not distinguishable from the instant case, the Court finds that they are both unconvincing and non-binding in this Circuit. The Court finds little merit in the notion that a flight crew has no legal obligation to care for its ill or endangered passengers. The practical effect of cases like *Abramson* is to dissolve the airlines' duty of care and to "create[ ] an incentive to airlines engaged in international travel not only not to exercise the highest degree of care but to completely refuse to treat" or assist passengers with medical problems. *McDowell, 54 F.Supp.2d at 1320.* In the absence of binding authority, the Court declines to adopt such a rule.[11]

The Court concludes that when a flight attendant's acts create a foreseeable risk of injury to passengers, an "accident" has occurred. *See Langadinos, 199 F.3d at 71.* In this case, Ms. Leptourgou's failure to respond appropriately to Ms. Husain's requests and her failure to

[11] Additionally, the Court cannot turn a blind eye on the sudden sea change in interpretation of the Convention that has occurred in the wake of the Supreme Court's recent decision in *Tseng, supra.* In reaching its conclusions of law in this case, the Court agrees with the *McDowell* court that cases such as *Abramson* and *Krys* create "absurd results" in the wake of *Tseng. McDowell, 54 F.Supp.2d at 1319.* Viewed in the proper context, the holdings of these pre-*Tseng* cases are less than compelling. *See generally McDowell, 54 F.Supp.2d at 1319* (discussing the effect of *Tseng* on Warsaw Convention jurisprudence).

comply with the applicable standards of care were both "unexpected" and "unusual." *See Tsevas v. Delta Air Lines, Inc., 1997 WL 767278 (N.D.Ill. Dec. 1, 1997)* (flight attendant's failure to move passenger upon request in order to keep her away from a second passenger's lewd behavior was an "accident" under Article 17). Therefore, Ms. Leptourgou's behavior is actionable under the Warsaw Convention.

Having concluded that Ms. Leptourgou's failure or refusal to assist Dr. Hanson constituted an "accident," the Court must next consider whether that "accident" caused Dr. Hanson's death. As discussed above, the coincidental occurrence of both an accident and an injury aboard an international flight does not necessarily support a cause of action under the Convention. To prevail, plaintiffs must establish that the accident *caused* the injury. *Gotz, 12 F.Supp.2d at 201.* In *Saks,* the Supreme Court recognized that "any injury is the product of a chain of causes." *Saks, 470 U.S. at 406, 105 S.Ct. 1338.* To establish liability, a plaintiff need only "prove that some link in the chain was an unusual or unexpected event external to passenger." *Id.* Courts have traditionally applied regular proximate cause analysis to determine carrier liability under the Convention. *See Margrave, 643 F.Supp. at 512.*

In light of this standard, the Court finds that Olympic's failure to move Dr. Hanson caused Dr. Hanson's death. As discussed above, Dr. Hanson's death was caused, at least in significant part, by smoke inhalation which triggered a severe asthmatic reaction. Dr. Hanson was seated in row 48, only three rows in front of the designated smoking section. Four witnesses at this trial were seated in Dr. Hanson's vicinity on Flight 417, and all four noted that the ambient smoke was noticeably thick in row 48. At several points in the flight, Dr. Han-

son indicated his discomfort with the seating arrangement. As noted above, Ms. Leptourgou or another member of the Olympic crew could have moved Dr. Hanson to any of the eleven empty seats on the plane or to one of the 17 non-smoking seats occupied by non-revenue passengers. If Ms. Leptourgou had moved Dr. Hanson out of the vicinity of the smoking section, he would not have died aboard Flight 417. Therefore, the Court must conclude that Dr. Hanson's death was caused by an accident, triggering liability under the Warsaw Convention.

B. Administration of Oxygen

In addition to Ms. Leptourgou's failure to move Dr. Hanson to another seat, plaintiffs argue that two other "accidents" occurred aboard Flight 417 which caused Dr. Hanson's death. First, plaintiffs assert that defendant's failure to effectively administer oxygen to Dr. Hanson through a face mask should be considered an "accident" under the Convention. According to plaintiffs, Dr. Hanson may not have died if the flight crew had properly prepared and supplied oxygen during Dr. Hanson's fatal attack.

To resolve this question, the Court must engage in a three-step inquiry. First, the Court must decide whether, as a purely legal matter, the failure to properly administer oxygen can be considered an accident. Second, the Court must decide as a factual matter whether the acts of the flight crew in this case constituted an unexpected or unusual event. If so, the Court must finally determine whether the flight crew's acts caused Dr. Hanson's death.

Turning first to the legal issue, the Court is aware of two published cases which address the question of whether an airline may be held liable under the Convention for the failure to properly administer oxygen. In *Tandon v. United Air Lines, 926 F.Supp. 366*

(S.D.N.Y.1996), the plaintiff suffered a heart attack during an international flight. When a doctor attempted to administer oxygen from the airplane's on-board canister, he discovered that the canister had expired two month's earlier, and that it contained insufficient oxygen supply. *Id. at 368.* The plaintiff did not receive proper care, and died aboard the flight. The district court found that, because no unusual or unexpected event external to the plaintiff had *triggered* the plaintiff's heart attack, the later failure of the defendant to save her did not constitute an accident. *Id. at 369.*

The Court declines to follow the rule enunciated in *Tandon*. The Court cannot agree with the *Tandon* court that an expired oxygen container or a negligently maintained medical kit can somehow be considered an "expected" or "usual" aspect of international flight. Rather, the Court adopts the reasoning of the district court in *McDowell v. Continental Airlines, 54 F.Supp.2d 1313 (S.D.Fla.1999)*. In *McDowell*, the court noted that improper maintenance of a carrier's on-board medical equipment can be considered an "accident." *54 F.Supp.2d at 1318.* In determining whether an accident had occurred, the court considered the carrier's level of care in maintaining the medical kit and the carrier's compliance or noncompliance with federal regulations and industry standards. *Id. at 1318.* Although the court in *McDowell* concluded that the plaintiff had failed to establish facts showing negligent maintenance of the on-board medical kit, the court's discussion is instructive. Therefore, the Court holds that the failure to properly maintain or administer oxygen to an ailing passenger aboard an international flight may be considered an accident.

The Court must next apply this legal conclusion to the facts of this case. As described above, the testimony on this subject is contradictory at best. Both Dr. Sabharwal

and Ms. Husain testified that the Olympic crew members were unable to provide bottled oxygen with an attached mask, while members of the crew testified that they did, in fact, provide an oxygen mask and canister, and that the apparatus functioned properly. Mr. Fotiades was particularly adamant in his testimony that he observed Dr. Hanson breathing oxygen through an Olympic-supplied mask at some point during the incident.

In light of this conflicting testimony, the Court finds that the evidence on the question of the oxygen administration is inconclusive. While the flight crew may have had some trouble preparing the oxygen when first asked by Ms. Husain, it is far from clear that the Olympic oxygen canister and mask were not used on Dr. Hanson or that the delay during the flight crew's troubles lasted more than a few moments. The Court notes that the time period between Ms. Husain's first request for oxygen and Dr. Hanson's death was approximately ten minutes. During a significant portion of that time, Dr. Sabharwal and Ms. Husain were administering CPR, making the availability of oxygen irrelevant. In the flurry of intense activity that preceded Dr. Hanson's death, it is possible that both Ms. Husain and Dr. Sabharwal failed to notice that Olympic's oxygen tank was in use.

Additionally, even if the flight crew did have some trouble preparing the oxygen canister, the Court cannot find that an accident necessarily occurred. In the heat of the moment, a certain amount of fumbling is normal and expected, even by experienced flight attendants. Plaintiffs have not established that the flight crew's problems providing an oxygen canister lasted for a significant period of time.

In sum, the Court finds that plaintiffs have failed to meet their burden of establishing that the flight crew's behavior in preparing the oxygen was unusual or unexpected. Therefore, the Court concludes that the flight crew's acts during Dr. Hanson's fatal attack did not constitute an accident.

Further, even if the acts of the flight crew could be described as an "accident," the Court finds as a matter of fact that any failure to properly administer oxygen did not cause Dr. Hanson's death. Even if the flight crew did commit an error, the Court cannot conclude that this error provided a link in the causal chain that resulted in Dr. Hanson's death. *See Saks, 470 U.S. at 406, 105 S.Ct. 1338.* In reaching this conclusion, the Court is cognizant of the testimony of Dr. Zarir G. Marawala, who explained that a nasal canula is typically less effective than a mask when a patient is experiencing respiratory distress. According to Dr. Marawala, a person in such a condition is more likely to attempt to breathe through his mouth.

While this may be true as a general proposition, the Court finds that the use of a mask would not have been useful in this case. By the time Ms. Husain and the Olympic crew attempted to administer oxygen to Dr. Hanson, his condition had progressed beyond salvation. According to the testimony of Dr. Wasserman, the administration of oxygen by way of a mask or a nasal canula is generally useless when a patient is experiencing airway obstruction. After reviewing the entire record, Dr. Wasserman concluded that any error in the administration of oxygen and CPR to Dr. Hanson did not cause his death. Rather, by the time Dr. Hanson was seated in row 19, properly-administered oxygen, even through a mask, would not have prevented Dr. Hanson's death. Dr. Golden's testimony also supports this conclusion. According to Dr. Golden, when a patient's airways are constricted, an oxygen mask is no more effective than a nasal canula.

On the basis of this testimony, the Court concludes that, even if the flight crew's delay in providing oxygen to Dr. Hanson constituted an "accident" under the terms of the Convention, that "accident" did not cause Dr. Hanson's death.

C. Failure to Ignite "No Smoking" Sign

Plaintiffs also argue that a separate "accident" occurred when the flight crew failed to request that the smoking passengers extinguish their cigarettes. Plaintiffs argue that the captain should have ignited the sign to ensure that no passengers would smoke in the vicinity of Dr. Hanson during his attack. According to plaintiffs, the failure of the captain and the flight crew to request that other passengers stop smoking while Dr. Hanson received oxygen constituted an "unusual" or "unexpected" event.

The Court rejects this argument for three reasons. First, according to the testimony of Olympic Airways captain Demetrios Karayannis, it is not standard procedure to ignite the "no smoking" whenever a passenger is experiencing medical problems. Viewed in light of this testimony regarding the standard of care, the Court cannot credit plaintiffs' argument.

Second, the Court finds nothing in the record to suggest that any passengers were smoking in the vicinity of Dr. Hanson while he received oxygen. Indeed, the smoking section of the airplane began in row 51, but, by the time the crew was aware of Dr. Hanson's distress, he was seated 31 rows away in row 19. Therefore, the flight crew's failure to turn on the "no smoking" sign did not constitute an unexpected or unusual event.

Finally, as discussed above, by the time the administration of Dr. Hanson's oxygen began, his condition had already become irreversibly fatal. Whatever minimal

level of ambient smoke may have reached row 19 during the incident, it certainly had no effect on Dr. Hanson's treatment, and did not cause his death.

III. Willful Misconduct

As discussed in section IIA above, Ms. Leptourgou's failure to move Dr. Hanson to another seat was an "accident," creating liability under the Warsaw Convention. Carrier liability under the Convention is normally limited to $75,000 per passenger. However, that limitation on damages does not apply if the defendant airline committed willful misconduct in causing the accident. *See Koirala v. Thai Airways Int'l, 126 F.3d 1205, 1209 (9th Cir.1997)*. Article 25, the Convention's "willful misconduct" provision, does not create a distinct cause of action separate from Article 17, the Convention's "accident" provision. *See McDowell, 54 F.Supp.2d at 1320.* Rather, Article 25 simply modifies the potential recovery of a passenger who has established the occurrence of both an "accident" and "willful misconduct." *Id.* In other words, if no "accident" occurred on the flight, the Court cannot find that defendant is separately liable for the "willful misconduct" of the crew. In this case, because the Court has concluded that an "accident" caused Dr. Hanson's death, the Court must next determine whether the behavior of the flight crew constituted "willful misconduct."

The Ninth Circuit has defined "willful misconduct" as "the intentional performance of an act with knowledge that the . . . act will probably result in injury or damage or the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences." *Koirala, 126 F.3d at 1209. See also Hermano, 1999 WL 1269187 at *5* (citing *Piamba Cortes v. American Airlines, Inc., 177 F.3d 1272, 1290*

(11th Cir.1999)) (to establish willful misconduct, plaintiff must show that defendant acted with "intent to cause damage" or " 'recklessly and with knowledge' that damage would probably result."). In a case published earlier this year, the Fourth Circuit considered whether "willful misconduct" requires subjective or objective recklessness. *See Bayer Corp. v. British Airways, PLC, 210 F.3d 236 (4th Cir.2000)*. The court concluded that the former standard was more appropriate, noting that "[o]n a mens rea spectrum from negligence to intent, article 25's standard is very close to the intent end." *Id. at 238*. Rather than establishing that the actor "should have known" of an obvious risk, the plaintiff in a case brought under the Warsaw Convention must, at a minimum, prove that the actor "must have known" of the risk in order to establish willful misconduct. *Id. at 239* (quoting *Piamba, 177 F.3d at 1291)*. The plaintiff bears a "heavy burden" in proving willful misconduct. *Id.; see also Saba v. Compagnie Nationale Air France, 78 F.3d 664, 668 (D.C.Cir.1996)* (requiring plaintiff to show actor's subjective state of mind in order to prove "willful misconduct"); *Piamba Cortes, 177 F.3d at 1291*. Although the Ninth Circuit has not explicitly decided whether Article 25 requires an element of subjective knowledge, the *Koirala* court held that "conscious and reckless disregard" of the crew's duties constituted willful misconduct under the Convention. *Koirala, 126 F.3d at 1212*. For the purposes of this decision, the Court will assume that the Article 25 requires a finding of subjective recklessness.

The Court must note, however, that Ms. Leptourgou's subjective state of mind "may be established solely by inferences taken from circumstantial evidence; the inferences thus act as 'a legitimate substitution for intent to do the proscribed act because, if shown, it is a proxy for that forbidden intent.' " *Piamba Cortes, 177 F.3d at*

1286 (quoting *Saba, 78 F.3d at 668)*. In fact, it is possible to infer subjective recklessness based on "the very fact that the risk was obvious." *Id. at 1291* (quoting *Farmer v. Brennan, 511 U.S. 825, 842, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)*).

In this case, the Court finds that the flight attendant's failure to move Dr. Hanson or to report Ms. Husain's request to the CCA was "willful misconduct." The Court concludes that, at the time of her third refusal to assist Dr. Hanson, Ms. Leptourgou *must have known* that the cabin was not full, that Dr. Hanson had a medical problem and a special susceptibility to smoke, and that her failure to move him would aggravate his condition and cause him probable injury. The Court reaches this conclusion only after a careful examination of the testimony and the circumstances of Ms. Leptourgou's repeated refusals to help the Husains.

A number of considerations support the Court's conclusion. First, the Court finds that, at the time of the accident, Ms. Leptourgou was aware of the industry standard of care described in section II, *supra*. Mr. Fotiades testified at trial that the flight attendants working under his supervision were aware of the appropriate responses to seat transfer requests. Second, the Court finds that Ms. Leptourgou was aware of Olympic's specific policy requiring that a flight attendant inform the CCA when a passenger requests a seat transfer for medical reasons. Ms. Xourgia testified that Olympic flight attendants receive formal training on this policy. Third, the Court finds that Ms. Leptourgou must have known that Flight 417 was not "totally full," as she informed Ms. Husain. The evidence shows that Ms. Leptourgou passed through the cabin prior to takeoff to ensure that all passengers were seated. During this walk-through, Ms. Leptourgou must have seen several empty seats. In

the face of this inference, defendant has submitted no evidence whatsoever to suggest that Ms. Leptourgou did not know or might not have known that the plane contained empty seats.

From this understanding, the Court next turns to the crucial testimony of Ms. Husain. Because Ms. Leptourgou was not available to testify in this trial, Ms. Husain's memory of her conversations with the flight attendant are entirely uncontested. The Court finds Ms. Husain's testimony on this topic highly credible.

The testimony of Ms. Husain makes one thing clear: Ms. Husain was not merely a typical passenger complaining about an inconvenient seat assignment. Ms. Husain made three requests to be moved. Nothing in the record indicates that any other passenger requested any such assistance more than once. Additionally, each of Ms. Husain's requests was more emphatic and desperate than the last. Once the passengers seated behind Dr. Hanson had begun to smoke, Ms. Husain's pleas reached a level of unmistakable urgency and seriousness. According to her testimony, Ms. Husain literally *begged* Ms. Leptourgou to move her husband. She told the flight attendant, "I don't care if the plane is full. Sit him on the carpet, sit him in first class, but don't sit him here." The Court finds that Ms. Husain communicated her husband's problem to the flight attendant so emphatically that Ms. Leptourgou must have recognized the danger. Further, Ms. Husain indicated to Ms. Leptourgou several times that she wanted only her husband moved, not the rest of the family. The fact that Ms. Husain was willing to sit apart from her husband during the entire ten-hour flight should have indicated to the flight attendant that the situation was serious enough to merit further consideration. After hearing the testimony of Ms. Husain, the Court concludes that Ms. Leptourgou cannot have

failed to recognize that Dr. Hanson's problem was a medical one and that sitting near the smoking section was likely to cause him injury.

Moreover, the evidence suggests that Ms. Leptourgou *did* in fact recognize the seriousness of Ms. Husain's request, even though she failed to respond appropriately. The fact that Ms. Leptourgou gave Ms. Husain permission to act on her own to find another seat indicates that she understood the seriousness of Ms. Husain's entreaties. Clearly, Ms. Leptourgou understood that Dr. Hanson's problem was serious enough to merit a seat transfer of some type. Her subsequent failure to assist Ms. Husain or to follow standard procedures by contacting the CCA is inexplicable. The Court can only conclude that by refusing to perform her duties, Ms. Leptourgou deliberately closed her eyes to the probable consequences of her acts. This was willful misconduct.

Defendant has suggested that, because Ms. Leptourgou could not have known that Dr. Hanson would die as a result of his allergy, she could not have recognized the risks inherent in her actions. While the Court agrees that Ms. Leptourgou did not know that Dr. Hanson would die if not moved, this fact alone does not preclude a finding of willful misconduct. Plaintiffs must show only that Ms. Leptourgou was aware that her refusal to assist Dr. Husain was likely to cause an injury to him; they need not establish that Ms. Leptourgou was aware of the exact injury that her act was likely to cause. *See Saba, 78 F.3d at 668.* In other words, Ms. Leptourgou need not have known, and in all likelihood did not know, that Dr. Hanson might die as a result of her refusal to assist him. However, for the reasons discussed above, she did know—she *must have known*—that her acts in violation of recognized policy were likely to cause him injury.

Defendant has also suggested that Ms. Husain should have been even more explicit than she was in making her pleas to Ms. Leptourgou. No doubt she could have used precise medical terms rather than stating that her husband was "allergic" to smoke. Arguably, she could have explained that her husband had suffered two serious medical incidents in the previous year that required the assistance of the paramedics. Perhaps these more explicit explanations would have propelled the flight attendant to take the appropriate action. However, the Court rejects this argument for two reasons. First, as explained above, Ms. Husain's pleas, while factually bare, were sufficiently straightforward to alert Ms. Leptourgou of the impending danger and the need to move Dr. Hanson to another seat. Ms. Husain's use of the term "allergic to smoke" notified Ms. Leptourgou that Dr. Hanson's problems were medical in nature, even though her words may have been medically imprecise. Further, the emotional urgency of Ms. Husain's requests, which was conveyed in her testimony before this Court, informed Ms. Leptourgou of the potential seriousness of Dr. Hanson's medical problems. Although Ms. Husain did not use the word "asthma" or describe the incident in Las Vegas, Ms. Leptourgou must have known the gravity of Dr. Hanson's condition.

Second, the Court declines to place the unreasonable burden on airplane passengers to provide a detailed explanation of their medical history in order to receive the mandatory and expected acceptable level of service. When aboard a commercial airplane, passengers can be anxious and inarticulate. Airline regulations, both written and unwritten, recognize that passengers are not always able to completely articulate their-needs. For this very reason, airlines create policies and procedures, such as Olympic Airways' requirement that a flight attendant

must inform the chief cabin attendant upon learning of a passenger's medical needs. At a minimum, compliance with such procedures leads to a more accurate exchange of information between the passenger and the crew. Ms. Leptourgou knew that Dr. Hanson had a susceptibility to smoke, knew that his wife feared serious injuries if he remained in row 48, knew that the flight was not entirely full, and knew that Olympic regulations required her to contact the CCA and/or to make an effort to move Dr. Hanson. In spite of all this knowledge, she did nothing.

Ms. Fairechild, a 21-year veteran of commercial airline service, testified to the egregiousness of Ms. Leptourgou's behavior, noting that she was "shocked" by Ms. Leptourgou's failure to act and labeling it "criminal." After reviewing the record, Ms. Fairechild testified that "I've never seen anybody treated like this on an international flight, so it's not—it's not airline service as far as I experienced or I would expect." In light of all this evidence, the Court must conclude that Ms. Leptourgou's behavior constituted willful misconduct, as that term has been interpreted under the Warsaw Convention. *See Koirala, 126 F.3d at 1211* (finding inference of willful misconduct based on expert testimony that "the flight crew's actions in this case were 'completely substandard of any scheduled airlines in the world.' ").

IV. Comparative Negligence

The Court must next turn to the difficult question of comparative negligence. While the Warsaw Convention creates a strict liability standard for injuries caused by accidents during international travel, that liability is not absolute. Article 21 of the Convention provides:

> If the carrier proves that the damage was caused by or contributed to by the negligence of the injured

> person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Both parties agree that the Court should apply California's comparative negligence standard in this case rather than a traditional contributory negligence standard. *Accord Eichler v. Lufthansa German Airlines, 794 F.Supp. 127, 130 (S.D.N.Y.1992)* (applying federal common law comparative negligence standard); *Bradfield v. Transworld Airlines, Inc., 88 Cal.App.3d 681, 685, 152 Cal.Rptr. 172 (1979)* (applying state law comparative negligence standard).

A recent unpublished district court opinion from New York perhaps best describes the Convention's rule regarding comparative negligence. *See Eichler v. Lufthansa German Airlines, 1994 WL 30464 (S.D.N.Y. Jan. 28, 1994)*. The *Eichler* court noted the apparent incongruity of the Convention's no-fault standard of liability under Article 17 and its consideration of contributory negligence under Article 21. Analogizing to the arena of strict products liability, the court concluded that Article 21's standard is best described as a "comparative causation" standard rather than a "comparative fault" standard. In other words, although the predicate for triggering Article 21 is negligence, "the basis for apportioning liability is the *comparative responsibility or causation* of the parties." *Id. at* *5 (emphasis added). The Court adopts this well-reasoned interpretation of the Convention.

Accordingly, the Court must consider two questions. First, the Court must determine whether Dr. Hanson acted negligently during Flight 417. If the Court answers that question in the affirmative, it must next consider the comparative causation of Ms. Leptourgou's refusal to

assist Dr. Hanson and Dr. Hanson's own negligent failure to act.

A. Dr. Hanson's Negligence

Defendant suggests that Dr. Hanson was negligent in two ways. First, defendant contends that Dr. Hanson's failure to request to speak with Ms. Leptourgou's supervisor was unreasonable. Second, defendant asserts that Dr. Hanson's failure to make any attempt to find another passenger who was willing to switch seats with him was also negligent. The Court will address these two arguments in turn.

1. Failure to Seek Assistance of Supervisor

First, defendant suggests that Dr. Hanson and Ms. Husain should not have merely accepted Ms. Leptourgou's refusal to move Dr. Hanson. Rather, they should have requested to speak with Ms. Leptourgou's supervisor. The Court disagrees. Imposing such a duty would place an unreasonable burden on a passenger, penalizing her for obeying the instructions of a flight attendant. Moreover, it is not realistic to expect Ms. Husain to understand the flight crew hierarchy aboard commercial aircraft. Indeed, as Ms. Husain testified at trial, she did not know at the time of the incident that Ms. Leptourgou even had a supervisor. A reasonable passenger in Ms. Husain's position would have reached precisely the conclusion that Ms. Husain herself reached after listening to the flight attendant's final rebuff: her husband could either remain in his assigned seat or take it upon himself to exchange seats with another passenger. The Court cannot fault either Dr. Hanson or Ms. Husain for failing to realize that the aircraft also carried a CCA to supervise the flight attendants.

2. *Failure to Attempt to Move Independently*

Defendant's second argument is far more persuasive. The Court finds that Dr. Hanson was negligent in failing to attempt to transfer his seat after Ms. Husain's third interaction with Ms. Leptourgou. As described above, after Ms. Husain's third request to move her husband, the flight attendant responded that the plane was full and that she could not move Dr. Hanson. She then told Ms. Husain, "You have to go ask people yourself."

Without question, Ms. Leptourgou's instruction to Ms. Husain was inappropriate in light of Olympic's policies. However, once the flight attendant granted Dr. Hanson and Ms. Husain permission to find a seat on their own, that option was available to them. Dr. Hanson, after apparently weighing the potential risk to himself against the inconvenience, discomfort and probability of success of personally requesting a seat transfer from other passengers, chose not to act. The Court finds that this decision was unreasonable under the circumstances.

Dr. Hanson was in a unique position to understand precisely how serious his condition was. He knew his medical history. He was aware of his near-fatal attack in Las Vegas and his breathing troubles in Alameda. As a doctor, he probably understood his condition and the risks associated with it. He alone knew exactly how the ambient smoke was affecting his body during the hours leading up to his death. In other words, like Ms. Leptourgou, Dr. Hanson must have known that he would probably be injured if he remained in row 48. Ms. Leptourgou presented him with an option to escape the potential injury that inhaling the smoke-filled air would cause: he could walk toward the front of the cabin and approach other passengers to ask them to switch seats with him. In light of what Dr. Hanson knew and what he should have known, the Court concludes that he should

have accepted Ms. Leptourgou's option, as unappealing as it may have appeared. The failure to do so constituted negligence.

B. Comparative Causation

While Dr. Hanson's failure to act was negligent, that negligence does not necessarily eradicate the effects of Ms. Leptourgou's wrongdoing. Dr. Hanson does not bear the full responsibility for the events that transpired after the meal service. *Either* Dr. Hanson *or* Ms. Leptourgou could have taken action to move Dr. Hanson to the front of the plane. Both should have taken such action. Neither can point to the other as being solely responsible for Dr. Hanson's death. The Court must therefore determine how each actor's wrongful or negligent decisions contributed to the tragedy that followed.

At first glance, it may appear that Dr. Hanson's failure to act played the larger role in causing his death. As discussed above, he had intimate knowledge of both the extent of his sensitivity to smoke and the effect of the ambient smoke on his ability to function during the flight. Further, it was Dr. Hanson who made the ultimate decision not to attempt to move. Viewing the facts from this perspective, whatever Ms. Leptourgou's culpability, Dr. Hanson should bear the greater responsibility for causing his own death.

After careful consideration of the evidence, the Court concludes that this "first glance" position is incorrect for two reasons. First, while Dr. Hanson should have attempted to switch seats with another passenger, there is no guarantee at all that his actions would have resulted in his finding a new seat farther from the smoking section. Nothing in the record indicates that other passengers would have been willing (or are typically willing) to switch seats at the request of a fellow passenger with

an assigned seat in close proximity to the airplane's smoking section. Further, it is far from clear that Dr. Hanson would have discovered the availability of the eleven unoccupied seats during his proposed sojourn to the front of the cabin. The evidence before the Court establishes that, to the average observer, the plane appeared to be full. The open seats were likely scattered throughout the cabin, and were difficult to see with an unfamiliar eye. Dr. Hanson may not have discovered an empty seat or found another passenger willing to swap seats.

On the other hand, if Ms. Leptourgou had acted properly, it is highly unlikely that Dr. Hanson would have remained in row 48. It is far more likely that, had Ms. Leptourgou followed the appropriate procedures, the CCA would have been able to move Dr. Hanson into one of the empty non-smoking seats. Further, the CCA also had unique knowledge as to which passengers were "non-revenue" passengers who could be easily asked to move. Therefore, in terms of likely outcomes, Ms. Leptourgou's failure to act was of greater consequence than Dr. Hanson's.

Second, although Ms. Leptourgou gave Dr. Hanson and Ms. Husain her permission to search for another seat, the fact remains that the flight attendant was in a far better position to effectuate a change. Ms. Leptourgou had knowledge of the flight crew hierarchy and had access to the CCA and his additional knowledge and influence. She also had the ability to find Dr. Hanson an open seat without any significant effort. Further, as a trained flight attendant, she had both experience and expertise in making requests such as the one she suggested that Ms. Husain make on her own. None of this can be said for Dr. Hanson himself. In other words, Ms. Leptourgou, had she merely responded to Ms. Husain's

pleas in an appropriate manner, could have achieved a seat transfer with far less effort than Dr. Hanson acting alone.

When a passenger enters a commercial flight, he surrenders a certain level of freedom—freedom of movement, of expression and of choice—in return for a promise of safety and comfort. Passengers agree to abide by a set of rules; they are expected to behave in a certain way in order to avoid communal danger. As an element of this unwritten compact, passengers bestow upon the airline and the flight crew nearly absolute authority to control and manipulate the mobile environment for the benefit of all those aboard. Courts have recognized this authority in both civil and criminal contexts. *See, e.g., 49 U.S.C. § 44902; 14 C.F.R. § 91.11.* Passengers grant a certain level of power to the airlines, but with that power comes responsibility. The flight crew has the unique ability to provide comfort and safety during air travel, which passengers have the right to expect. *See McDowell, 54 F.Supp.2d at 1319* ("It is recognized in most jurisdictions that airlines owe a heightened duty of care to their passengers."); *Williams v. Trans World Airlines, 509 F.2d 942, 946 n. 8 (2d Cir.1975)* ("It has generally been held . . . that commercial air lines . . . owe their passengers the duty of utmost care for their safety.").

In this case, as a result of his position as an airline passenger, Dr. Hanson's ability to make decisions about his fate and to act on those decisions was diminished. By entering the controlled environment of the airplane, Dr. Hanson had authorized the flight crew to act on his behalf to protect his safety. In return, he implicitly agreed to obey the commands of the flight crew—to remain in his assigned seat until permitted to move, to sit when told to do so, and not to disrupt the cabin envi-

ronment. Therefore, while Dr. Hanson himself may have been in the best position to recognize the danger that row 48 presented to him, he was in the worst position to actually do something about it.

For these reasons, the Court cannot find that Dr. Hanson's negligence played a more significant causal role in his death than did Ms. Leptourgou's wrongdoing. By the same token, because of Dr. Hanson's unique knowledge of the danger, the Court cannot conclude that he played no role in causing his death. In the end, the Court concludes that the failures of both parties contributed equally to the tragedy that followed. Therefore, the Court finds that Dr. Hanson was comparatively liable for his death at a rate of 50%.

V. Damages

Having determined that defendant is liable under the Warsaw Convention, that defendant's liability is not limited to $75,000, and that defendant was contributorily negligent in causing his own death, the Court must next determine the total amount of damages suffered by plaintiffs as a result of Olympic's misconduct. The evidence before the Court supports an award of damages commensurate with the pecuniary loss to Dr. Hanson's surviving family. The parties have not established in their briefs or their arguments to the Court that damages in excess of that amount are legally appropriate in this case.

To determine the amount of pecuniary damages, the Court received a report and heard testimony from C. Daniel Vencill, Ph.D., who examined Dr. Hanson's financial health for the purposes of determining damages in this case. Dr. Vencill's testimony was uncontradicted, and his conclusions went largely unchallenged by defendant. Defendant's post-trial brief and argument do not

attack the validity of Dr. Vencill's methodology or his calculations.

Dr. Hanson's earning history shows an average taxable income of $140,052.12 over the six-year period prior to his death. He intended to work until at least age 65 in order to provide for his family and finance his children's college education. Based on Dr. Vencill's uncontroverted testimony, assuming a 5.5% discount rate and a 2% growth rate, and deducting at a rate of 31% for personal consumption, the Court concludes that the total amount of pecuniary loss to plaintiffs as a result of Dr. Hanson's death was $1,400,000.00.[12]

This finding is supported by Dr. Vencill's calculations, as presented in his written and oral testimony to the Court. In reaching this conclusion, the Court is guided by Dr. Vencill's testimony that the most accurate calculation of Dr. Hanson's income is reached by modifying Dr. Hanson's taxable income to account for cash flow. Additionally, the Court finds Dr. Vencill's calculations based on Dr. Hanson's six-year earnings more reliable than the calculations based on Dr. Hanson's 1997 earnings alone. Finally, although Dr. Vencill posited at trial that a higher figure of approximately $1.5 to $1.6 million was appropriate, the Court accepts the $1.4 million figure because it more accurately reflects the total amount of non-market work performed by Dr. Hanson in his home prior to his death.

As noted above, the Court finds that Dr. Hanson was comparatively negligent at a rate of 50% in causing his death. Therefore, plaintiffs may recover only 50% of

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12 Although Dr. Hanson's medical practice sold for $200,000 after his death, the Court will not use this figure to mitigate the total damage to the surviving family members. The practice would have elicited a similar price upon Dr. Hanson's retirement even if he had not died in 1998.

their $1,400,000.00 in economic losses. The Court awards plaintiffs $700,000.00 in total damages.

CONCLUSION

For the foregoing reasons, the Court hereby finds that an accident occurred aboard Olympic Airways Flight 417 on January 4, 1998, and that the accident caused the death of Dr. Abid Hanson. The Court further finds that Olympic Airways committed willful misconduct in failing to react to Ms. Rubina Husain's requests for a seat transfer for her husband. Finally, the Court finds that Dr. Hanson himself was contributorily negligent in causing his death, and that his negligence contributed to his death at a rate of 50%. Accordingly, the Court hereby awards plaintiffs $700,000.00 in damages.

IT IS SO ORDERED.

RELEVENT ARTICLES OF THE WARSAW CONVENTION

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty,

mandate, or authority of the same High Contracting Party.

49 Stat. 3014-3015.

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018.

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject

to proof to the contrary, to have been the result of an event which took place during the transportation by air.

49 Stat. 3019.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

49 Stat. 3019.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

49 Stat. 3019.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance

with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

49 Stat. 3020.

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In The

Supreme Court of the United States

OLYMPIC AIRWAYS,

Petitioner,

v.

RUBINA HUSAIN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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I

THE PETITION PRESENTS NO ISSUE APPROPRIATE FOR REVIEW BY THIS COURT

Petitioner, Olympic Airways ("Olympic"), represents that the decision herein[1] has created new law in conflict with other circuits and at odds with Supreme Court precedent. As demonstrated below, the Petition lacks merit: this case creates absolutely no conflict or departure from the Supreme Court's decision in *Air France v. Saks*, 470 U.S. 392 (1985), which defines an "accident" under Article 17 of the Warsaw Convention,[2] and which the district court faithfully followed and correctly applied to the instant facts.

Petitioner next asks this Court to revisit its opinion in *Saks*, in light of its decision in *El Al Israel Airlines v. Tseng*, 525 U.S. 155 (1999), using this case as a vehicle for asserting post-*Tseng* confusion in the lower courts. Yet this Court saw no reason when deciding *Tseng* to modify *Saks*, and Petitioner's transparent suggestion that the definition be narrowed in the wake of *Tseng* is unwarranted. More fundamentally, the instant case provides no basis whatsoever for reformulating the clear mandate of *Saks*, which continues to guide courts reliably and predictably in determining what constitutes an "accident" under Article 17.

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[1] 116 F. Supp.2d 1121 (N.D. Cal. Oct. 3, 2000), *aff'd*, 316 F.3d 829 (9th Cir. 2002).

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), 137 L.N.T.S. 11, reprinted in note following 49 U.S.C. § 40105 ("Warsaw Convention").

II

STATEMENT OF RELEVANT FACTS

Abid M. Hanson, M.D., traveled with his wife and three children (Plaintiffs/Respondents Husain) from San Francisco to Athens and Cairo during the winter holidays in 1997.[3] Because Dr. Hanson was an asthmatic, the family specifically requested nonsmoking seats. They were accommodated on all but the return flight from Athens to New York, when Olympic seated Dr. Hanson and his family just three rows ahead of the smoking section.[4]

Dr. Hanson had traveled without incident on all the flights on which he had been seated toward the middle of the aircraft, away from the smoking section. The family had specifically notified the Olympic gate agent in Cairo that Dr. Hanson had asthma, and emphasized that he could not be near smoke. From the time the Husains boarded and first discovered the location of their seats, Mrs. Husain notified an Olympic flight attendant that her husband was "allergic to smoke," and she thereafter pleaded several times with the same flight attendant to move him to a seat farther away from the smokers. But Mrs. Husain's increasingly urgent pleas fell on deaf ears.[5] Despite the fact that there were a number of nonsmoking seats available on the flight,[6] the Olympic flight attendant,

[3] *Id.*, 116 F. Supp.2d at 1124.

[4] *Id.* at 1135.

[5] *Id.* at 1124.

[6] The district court found that there were 11 empty seats, as well as 17 non-smoking seats assigned to "non-revenue passengers," who were airline employees and their relatives. *Id.* at 1126.

Maria Leptourgou, responded that the plane was "totally full," and refused to seat Dr. Hanson away from the smoky rear of the cabin or take any other action consistent with her duties.[7]

As passengers in the smoking section, both seated and standing in the aisles, filled the rear-cabin air with cigarette smoke blowing directly toward him, Dr. Hanson began to experience respiratory distress. The distress quickly progressed into a major asthmatic episode. Dr. Hanson himself moved forward to escape the smoke; after he had arrived near the front of the aircraft, his condition having visibly deteriorated, Olympic provided a seat for him. Efforts were made primarily by Dr. Hanson's travel companion, also a physician, to relieve the cigarette smoke-induced asthma attack. But these efforts were to no avail, and Dr. Hanson died from acute respiratory distress.[8]

After a bench trial, the district court made the following relevant factual findings: that the conduct of the Olympic crew, and particularly of flight attendant Maria Leptourgou, violated Olympic's own policies and procedures; that said conduct violated accepted industry standards applicable to flight attendants; and that it was consequently "aberrant behavior," both unexpected and

[7] Significant to the district court's factual findings was the "quite credible" testimony of Mrs. Husain, which was "largely corroborated" by the testimony of other eyewitnesses, and totally uncontradicted, as Ms. Leptourgou did not testify (although numerous other members of the Olympic crew did). *Id.* at n. 2.

[8] *Id.* at 1128, 1130.

unusual.[9] The district court further found that this behavior resulted in the death of Dr. Hanson, which "was caused, at least in significant part, by smoke inhalation which triggered a severe asthmatic reaction."[10] On the evidence established, the court drew an appropriate factual inference that, "If Ms. Leptourgou had moved Dr. Hanson out of the vicinity of the smoking section [as the family had repeatedly requested], he would not have died aboard flight 417." Accordingly, the district court concluded that Dr. Hanson's death was caused by an accident, triggering liability under the Warsaw Convention.[11]

III

REASONS FOR NOT GRANTING THE PETITION

A. There is No Conflict Where the Same Rule Properly Applied to Different Facts Yields Different Results.

Petitioner complains that the courts below found an Article 17 accident under these facts, when the Third and Eleventh Circuits found – under different sets of circumstances with little factual similarity to this case – no accident. Petitioner overlooks the obvious – the circuits are not in conflict when they reach different results given different facts.

Ignoring the significant factual differences between the cases, Olympic insists that the instant case is functionally

[9] *Id.* at 1133.

[10] *Id.* at 1135.

[11] *Ibid.*

identical to *Abramson v. Japan Airlines, Co. Ltd.*, 739 F.2d 130 (3d Cir. 1984) and *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997). But this purported identity between the cases is a fiction designed by Petitioner solely to create the appearance of conflict – or worse, the appearance that the court has tampered with established precedent – to justify Supreme Court review.

The court below faithfully applied the rule established in *Saks*, which held that Article 17 liability "arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger." *Saks*, 470 U.S. 392, 405. It reached a result appropriate under the particular circumstances of this case precisely because it applied the rule correctly.

When this Court in *Saks* formulated, intentionally, a *flexible* test for determining what constitutes an Article 17 accident, it wisely understood that the determination had to be a highly factual one, based on an "assessment of all the circumstances surrounding a passenger's injuries." *Ibid.* With the test established in *Saks*, this Court expressly recognized and anticipated that many different sets of facts can and would qualify as Article 17 accidents. Significantly, it approved a string of decisions in which "lower courts in this country have interpreted Article 17 broadly enough to encompass torts committed by terrorists or fellow passengers." *Ibid.* Later, in *Tseng*, it criticized as "questionable" the Second Circuit's application of the accident test resulted in a conclusion that "mistakes" by airline personnel in carrying out security searches are not "unexpected or unusual" under *Saks*. *Tseng*, 525 U.S. at n. 9.

In addition to defining what *is* an Article 17 accident, *Saks* identifies what *is not* an accident and hence not

compensable under Article 17. This Court stated, "When the injury indisputably results from the passenger's own reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply." *Saks.* at 406. Olympic fails to appreciate that both faces of the *Saks* coin, both the definition and the exception, call for fact-driven inquiries.

Here, the district court found on the basis of credible evidence, including expert testimony, that the misconduct of the flight crew was unusual and unexpected, abnormal, *aberrant*. The district court made a factual finding approved by the Court of Appeals that the crew's egregious departure from what is expected under industry standards and Olympic's own policies provided the link in the causal chain of events that led to Dr. Hanson's death. Under a faithful application of the test mandated by *Saks*, such facts necessarily compel the conclusion that Dr. Hanson's death was an "accident" within the meaning of Article 17 of the Warsaw Convention.

B. At the Source of the "Conflict" Described by Petitioner is Olympic's Disagreement with the Factual Findings of the District Court.

Petitioner argued in the Ninth Circuit that the district court clearly erred in not adopting Olympic's version of the facts, that Dr. Hanson died of anaphylactic shock rather than an asthmatic episode induced by cigarette smoke.[12] (Arguably, had the cause of death been a fatal allergic

[12] 316 F.3d 829 at 836.

reaction to the meal ingested without incident by other passengers, and absent notice to the flight crew of any special food requirement, no accident under *Saks* would have occurred.) The Court of Appeals found no error in the district court's factual findings and properly affirmed.

Hoping to fashion a legal issue ripe for this Court's consideration, Olympic pretends in its Petition to set aside its quarrel with the factual findings of the district court. Yet, throughout its Petition, Olympic improperly insinuates that the district court erred in its factual determination regarding the cause of Dr. Hanson's death, calling attention to the evidentiary debate below and the more difficult factual determinations the district court had to make.[13] This is wholly inappropriate in a petition for *certiorari*, because a review of those findings is not the function of this Court. Olympic's insistence notwithstanding belies the impropriety of the Petition, which seeks not clarification or guidance for the lower courts as it professes, but rather that this Court second-guess the Court of Appeals' affirmance of the district court's highly fact-driven opinion.

[13] For example, there is no reason for purposes of this Petition to review the evidence of Dr. Hanson's history with food allergies, except (improperly) to cast doubt over the district court's factual findings regarding the proximate cause of death. As the Ninth Circuit pointed out, "Whether Dr. Hanson's death was caused by a reaction to second hand smoke resulting from Ms. Leptourgou's failure to assist or by a reaction to food allergies may appear to be a close call. However, the district court, as trier of fact, was in the best position to determine which of two plausible explanations was correct." 316 F.3d 829, 839.

1. The accident here was the crew misconduct which precipitated the fatal asthma attack, not an aggravation by normal flight operation of a pre-existing condition.

The district court below made a specific factual finding that "the flight attendant's failure to transfer Dr. Hanson – or her failure to at least follow the proper procedures – *precipitated* Dr. Hanson's injury and death." 116 F. Supp.2d at 1134 (emphasis in original). Partly on the basis of this finding, the court distinguished *Abramson* and *Krys*, in which crew inaction may have *aggravated* the injuries which those passengers had suffered "as a result of entirely 'internal' forces." *Ibid.* Ignoring the court's fact distinction, Olympic continues to refer to the accident in this case as the "aggravation" of Dr. Hanson's preexisting condition.[14] Again, the results in this case were not different because the court below misapplied the law, or created new law, but because the court correctly applied the established law to significantly different facts.

2. Crew misconduct – not the existence of ambient cigarette smoke – was the "unusual, unexpected" link in the chain for which Olympic is liable under Article 17.

The district court found that while cigarette smoke played a role physically in Dr. Hanson's death, the misconduct of the Olympic crew was the "unusual or unexpected" link in the chain of causation satisfying the conditions for Article 17 liability. Again, disregarding the

[14] Petition, *Passim*.

court's findings, the Petition stubbornly refers to smoke in the cabin (not the conduct of the crew) as the link in the chain of causation identified by the district court as giving rise to Article 17 liability.[15]

Petitioner's technique of rejecting and avoiding the district court's findings in order to create factual identity between this case and *Krys* and *Abramson* is a misleading and improper strategy for invoking Supreme Court review. It is a plain attempt to create the appearance of conflict or anomaly where neither exists.

C. The Holdings in Both *Abramson* and *Krys* Expressly Apply Only in the Absence of "Abnormal" Circumstances.

Also minimized to a distorting degree in the Petition is the clear qualification prefacing the holdings in both *Abramson* and *Krys*, a qualification within which this case neatly fits. Both cases expressly held: "*In the absence of proof of abnormal external factors*, aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an 'accident' within the meaning of Article 17." *Abramson*, 739 F.2d 130, 133, *Krys*, 119 F.3d 1515, 1520. (Emphasis added.)

In addition to finding that, unlike the injuries alleged in *Abramson* and *Krys*, Dr. Hanson's death did not result

[15] See, e.g., the Petition at p. 2: "This Petition involves the legal question whether, as a matter of treaty law, a normal condition in the aircraft cabin [smoke] which aggravates a passenger's pre-existing medical condition, can meet the 'accident' condition precedent to liability under Article 17 of the Warsaw Convention."

from an *aggravation* of injury, the court below identified numerous abnormal external factors that, when considered together pursuant to the analysis mandated by *Saks*, contributed to and supported the finding of accident. The crew misconduct was "aberrant" and in violation of industry standards and airline policies. Significantly, neither *Krys* nor *Abramson* involves a serious breach of industry standard or airline policy. To aver, as Petitioner does, that the holdings in *Krys* and *Abramson* can be stretched to shield airlines from liability for a passenger death caused in significant part by crew conduct determined by the fact finder to amount to a blatant disregard of industry standards and airline policy is, quite simply, to miss the point of both decisions.

Olympic can identify no inconsistency between the application of *Saks* in *Krys* and *Abramson* and its application in this case without seriously misconstruing the factual findings of the district court, or else distorting the holdings in those cases. To fabricate a conflict, Olympic even resorts improperly to calling this Court's attention to an unpublished decision.[16] The reason is simple: there is no hint of conflict in the circuits, only a predictable and appropriate difference in outcomes following the proper application of the rule in *Saks* to different factual scenarios.

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[16] Petition at 15, n. 10. Olympic cites an unpublished decision from the Fourth Circuit, concluding without analysis that it is consistent with *Krys* and *Abramson* and thus "also in conflict with" the decision below. Not only does Olympic fail to point out the conflict, if any, the reference is improper because the Fourth Circuit disfavors citation of unpublished decisions, which are deemed to have no precedential value. 4th CIR. R. 36.

D. Crew Misconduct that Places a Passenger Squarely in Harm's Way is Still a Link in the Chain of Causation.

Olympic asks this Court to decide whether crew misconduct can qualify as an accident under Article 17 where there is a more immediate, physical cause of injury: here, Dr. Hanson's respiratory distress triggered when a flight attendant refused to perform the duties expected of her, in violation of industry standards and airline policy. This Court has already unequivocally answered this question in the affirmative. In *Saks*, the Court stated: "Any injury is a product of a chain of causes, and we require only that the passenger be able to prove that *some link in the chain* was an unusual or unexpected event external to the passenger." *Saks*, 470 U.S. 392, 405, 105 S.Ct. 1338. (Emphasis added.)

To suggest, as Olympic does, that the physiological cause of death was not anything external to Dr. Hanson is a distortion of the causation requirement implicit in the accident definition set forth in *Saks*. That causation requirement – as stated in *Saks* and as explained by subsequent decisions – is properly applied much like a proximate cause analysis. Indeed, the court below faithfully restated without modification and followed the rule in *Saks* when it found that crew misconduct in this case was a link in the causal chain that led to Dr. Hanson's death.

E. *Tseng* Has Not Unleashed Confusion in the Lower Courts Over the Proper Application of the Rule in *Saks*.

Still insisting on a factual identity between this case, *Abramson* and *Krys*, Olympic posits that the result must have been different here because the other two cases were decided before this Court held in *Tseng* that liability against airlines for injuries caused during international air travel could not exist outside the Convention. Accordingly, Petitioner fears, district courts after *Tseng* will attempt to compensate plaintiffs by expanding the definition of "accident". Petition at 20.

Since *Tseng*, litigants have indeed switched sides[17] in arguing for or against a finding of Article 17 accident in a specific case: defendant airlines prior to *Tseng* sought the protections of the Convention from the common law liability claims and hence urged a broader definition, while plaintiffs sought to avoid the reach of Article 17 and attendant recovery limitations, particularly when compensation for Warsaw injuries was limited in most cases to $75,000.[18] However, although cases finding no accident

[17] For example, in *Krys*, the defendant airline argued for a finding of "accident" under the Warsaw Convention in order to avoid, on preemption grounds, a large jury award based on a state law claim.

[18] The fact that many airlines have voluntarily lifted the $75,000 liability limitation by signing the IATA Accords is further reason for airlines to try to narrow the definition of accident under Article 17 . See International Air Transport Association Intercarrier Agreement on Passenger Liability, approved by D.O.T. Order 96-11-6 (D.O.T. Nov. 12, 1996). Arguably, the promulgation of the Accords has had an even greater effect than any court decision on the reversal of the airlines' position on "accident".

before *Tseng* applied *Saks* under circumstances which still allowed resort to state law, a possibility which *Tseng* has eliminated, Petitioner can cite to no evidence that *Tseng* has altered the way in which district courts are applying the resilient accident definition established in *Saks*. Courts are reaching results that differ according to the facts presented to them precisely because they are doing what this Court mandated in *Saks*: assessing all of the factual circumstances of the injury in determining whether the conditions for compensation under Article 17 have been met. Petitioner's prognostication that district courts will disregard the mandate of *Saks* in order to maximize plaintiffs' recovery is unfounded and, indeed, belies an alarming lack of confidence in the district courts to continue to faithfully follow Supreme Court precedent.

IV

CONCLUSION

Petitioner is asking not for guidance but for a narrowing of the definition of "accident" established by this Court in *Saks*. There is no reason for the Court to modify *Saks*, and certainly none raised by this case. Because the instant case plainly creates no conflict or departure whatsoever, the true basis of the Petition is Olympic's dissatisfaction with the district court's application of the law to a particular set of facts with which Petitioner disagrees. Consequently, the Petition presents no issue worthy of consideration by this Court, and must therefore be denied.

Dated: April 11, 2003

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IN THE

Supreme Court of the United States

OLYMPIC AIRWAYS,

Petitioner,

—v.—

RUBINA HUSAIN, ET. AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioner OLYMPIC AIRWAYS ("OLYMPIC") respectfully submits this reply to Respondents' Brief in Opposition ("Opp. Brief") to the Petition for writ of certiorari.

ARGUMENT

THE CONFLICT IS LEGALLY, NOT FACTUALLY, BASED

OLYMPIC does not seek to reargue the facts or for the Court to "revisit" *Air France v. Saks*, 470 U.S. 392 (1985). *See* Opp. Brief at 1, 4-7. OLYMPIC seeks the Court's guidance as to whether the decisions of the Third and Eleventh Circuit in *Abramson v. Japan Airlines, Co., Ltd.*, 739 F.2d 130 (3d Cir. 1984) and *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), or the decision of the Ninth Circuit below, properly apply the legal standards set forth by the Court in *Saks*.

A. The Conflict Among the Circuit Courts Is "Legally" Irreconcilable

Respondents attempt to recast the question presented for review as a factual issue in their effort to deflect the attention of the Court from the clear legal-based conflict created by the decision of the Court of Appeals below, which created a new standard for an "accident" under Article 17 of the Warsaw Convention[1] at odds with *Saks*, *Abramson*, *Krys* and the Warsaw Convention.

OLYMPIC affirmatively stated in the Petition that it does *not* dispute the Findings of Fact of the District Court as adopted by the Court of Appeals (A 3a-9a). *See*

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in note following* 49 U.S.C.A. § 40105 (1997).

Petition at 4. Thus, respondents' argument that OLYMPIC simply seeks review of factual issues is baseless. *See* Opp. Brief at 4-7. In fact, the recitation of the facts in the Petition mirrors those set forth by the Court of Appeals. *Compare* Petition at 4-6 *with* Decision of the Court of Appeals below, reproduced in the Appendix to the Petition at A 4a-9a.

Similarly, respondents seek to dismiss the conflict of the decision of the Circuit Court below with *Krys* and *Abramson*, by claiming that the conflict is factually based. *See* Opp. Brief at 4-6. The Petition herein, however, presents for review the conflict created by the legal definition of "accident" adopted by the Court of Appeals below. *Krys* and *Abramson* addressed the legal issue of whether an injury/death arising out of a passenger's pre-existing medical condition due to alleged crew negligence during the course of a normal flight can be an Article 17 "accident" and held, no. This is the exact legal issue presented to the Court of Appeals below, which held, yes. The Court should reject respondents' attempt to recast this legal issue into a factual dispute.

The Courts in *Krys* and *Abramson* found that the only correct approach to analyzing the "accident" requirement is to look at the factual events, as opposed to an assertion of crew negligence. Unlike the Third and Eleventh Circuits, the Ninth Court focused its Article 17 "accident" analysis on crew negligence. This analysis is contrary not only to *Abramson* and *Krys*, but also to *Saks*, which clearly stated that the "accident" inquiry is into the nature of the event which caused the injury, and not the care taken by the airline to avert the injury. *Saks*, 470 U.S. at 407 (negligence is relegated to the "all necessary measures" defense under Article 20(1), which is reached only if the Article 17 conditions to liability first are satisfied). *See also El Al Israel Airlines, Ltd. v. Tseng*, 525

U.S. 155 (1999). Accordingly, respondents' argument that all that is required is some "abnormal" crew conduct (Opp. Brief at 9-10) misapprehends *Abramson* and *Krys* and misapplies *Saks* and the Convention.

The Court of Appeals below held:

> The failure to act in the face of a known, serious risk satisfies the meaning of "accident" within Article 17 so long *as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane*.

Petition at A 14a (emphasis added).

The holding of the Court below is irreconcilable on its face with Articles 17, 20(1) and 25 of the Convention, *Saks*, *Abramson* and *Krys*. Significantly, respondents ignore the legal conflict created by the decision of the Court below to incorrectly shift the focus of the "accident" (Article 17) inquiry into the care taken by the airline to avert the injury and the carrier's mental state (Articles 20(1) and 25). Rather than attempt to provide a legal rationale for the legal conflict created by the Court below, which injected into Article 17 the alien concepts of the "absence of negligence" and "reasonable alternatives" (Article 20(1)) and "wilful misconduct" (Article 25), respondents attempt to shift the Court's focus to the undisputed facts.

Respondents argue that, unlike *Abramson* and *Krys*, OLYMPIC's conduct "precipitated" and did not "aggravate" the passenger's injury. *See* Opp. Brief at 8. Neither the *Abramson* nor *Krys* legal analysis is based on such a distinction. In fact, the Court below never made such a distinction, nor could it in light of the district court's finding that OLYMPIC should have known that the "fail-

ure to move [Dr. Hanson] would **aggravate** his condition and cause him probable injury" (A 67a), and conclusion that Dr. Hanson's death was caused by "an **exacerbation** of his asthmatic condition due to the prolonged and extensive exposure to second-hand smoke" (A 47a) (emphasis added).[2] Thus, respondents fail to explain how the "accident" standard created by the Court of Appeals below can be reconciled with *Saks*, *Krys* and *Abramson* —the claimed factual distinctions (not even so distinct with respect to the *Abramson* case) do not overcome the conflicting legal standards.

B. The Court Should Make Clear that the Legal Issue of What Constitutes an Article 17 "Accident" Has Not Been Changed by Tseng

Contrary to respondents' argument (Opp. Brief at 12-13), a faithful reading of the decisions issued following *Tseng* reflects that the lowers courts have in fact redefined "accident." Before *Tseng*, courts interpreted an "accident" *not* to include an injury due to a passenger's pre-existing medical condition even if there were allegations of crew negligence. *See Krys*, 119 F.3d at 1521-22; *Abramson*, 739 F.2d at 132-33; *Rajcoorar v. Air India Ltd.*, 89 F. Supp. 2d 324, 328 (E.D.N.Y. 2000); *Tandon v. United Air Lines*, 926 F. Supp. 366, 369-70 (S.D.N.Y. 1996); *Fischer v. Northwest Airlines*, 623 F. Supp. 1064, 1065 (N.D. Ill. 1985). After *Tseng*, courts improperly have adopted the opposite interpretation of "accident." *See* Decision of the district court below (A 58 n.111); *Gupta v. Austrian Airlines*, 211 F. Supp. 2d 1078, 1084 (N.D. Ill. 2002); *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 666 (S.D.N.Y. 2001);

[2] In any event, the courts below both found that Dr. Hanson was struggling from his asthmatic condition during the layover in Athens, well before he boarded the OLYMPIC flight. A 6a; A 37a, 45a.

McCaskey v. Continental Airlines, Inc., 159 F. Supp. 2d 562, 573 (S.D. Tex. 2001). To the extent that the lower courts are tampering with the legal question of what constitutes an Article 17 "accident" to avoid the Convention's preemption of state law-based causes of action, the courts, including the Court below, are issuing incorrect decisions that are contrary to the Warsaw Convention and in conflict with Supreme Court precedent. The term "accident" did not have one meaning before *Tseng*, and another meaning after *Tseng*.

CONCLUSION

The Petition for Writ of Certiorari should be granted in all respects.

Dated: April 23, 2003

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—v.—

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 12, 2003
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA (S.F.)

CIVIL DOCKET FOR CASE No. 99-CV-1400

HUSAIN, ET AL

—v.—

OLYMPIC AIRWAYS

3/23/99	1	NOTICE OF REMOVAL (no process) by defendant Olympic Airways from Alameda County Superior Court, Case Number: 807257-1; Summons, Complaint, Fee status pd entered on 3/23/99 in the amount of $150.00 (Receipt No. 51607) [3:99-cv-01400] (ga) [Entry date 03/24/99]
3/23/99	3	ANSWER by defendant Olympic Airways to removal complaint [1-1] [3:99-cv-01400] (ga) [Entry date 03/24/99]
3/25/99	4	NOTICE by defendant Olympic Airways [1-1] removal complaint [3:99-cv-01400] (ga) [Entry date 03/26/99]

2/25/00	31	NOTICE OF MOTION AND MOTION WITH MEMORANDUM OF POINTS AND AUTHORITIES before Judge Charles R. Breyer by defendant Olympic Airways for summary judgment with Notice set for 3/24/00 at 10:00 am; attached declaration of Stephen J. Fearson. [3:99-cv-01400] (mcl) [Entry date 02/28/00]
3/3/00	33	MEMORANDUM of points and authorities by Plaintiffs in opposition to motion for summary judgment [31-1] [3:99-cv-01400] (mcl) [Entry date 03/07/00]
3/10/00	36	REPLY MEMORANDUM by defendant Olympic Airways to opposition to motion for summary judgment [31-1] [3:99-cv-01400] (mcl) [Entry date 03/14/00]
3/24/00	37	MINUTES: (C/R Rosita Flores) (Hearing Date: 3/24/00) denying defendant's motion for summary judgment [31-1] Pretrial conference set for 2:30 5/18/00; Jury trial will be held 8:30 5/22/00; [3:99-cv-01400] (mcl) [Entry date 03/29/00]
5/24/00	59	DIRECT TESTIMONY OF PLAINTIFF EXPERT Diana Fairechild. [3:99-cv-01400] (mcl) [Entry date 05/31/00]
5/24/00	60	DIRECT TESTIMONY OF PLAINTIFF EXPERT Jeffrey Golden, M.D. [3:99-cv-01400] (mcl) [Entry date 05/31/00]
6/16/00	65	DECLARATION by Lefteris Haniotis on behalf of defendant Olympic Airways [3:99-cv-01400] (mcl) [Entry date 06/19/00]

8/28/00	76	FINDINGS of fact and conclusions of law by Judge Charles R. Breyer: the Court awards plaintiffs $700,000.00 in damages (cc: all counsel) [3:99-cv-01400] (mcl) [Entry date 08/29/00]
10/2/00	82	AMENDED FINDINGS of fact and conclusions of law by Judge Charles R. Breyer. The Court hereby awards plaintiffs $700,000.00 in damages (see document for specifics) (cc: all counsel) [3:99-cv-01400] (mcl) [Entry date 10/05/00]
11/28/00	90	SUPPLEMENTAL FINDINGS of fact and conclusions of law by Judge Charles R. Breyer: the Court supplements its earlier Amended Findings by awarding the plaintiffs an additional $700,000.00 in non-pecuniary damages (cc: all counsel) [3:99-cv-01400] (mcl) [Entry date 11/29/00]
11/28/00	91	JUDGMENT: by Judge Charles R. Breyer Pursuant to the Court's Amended Findings of Fact and Conclusions of Law dated 10/2/00 and its supplemental Findings of Fact and Conclusions of Law dated 11/28/00, it is hereby ordered that Judgment be entered in favor of the plaintiffs and against the defendant in the amount of $1,400,000.00 (Date Entered: 11/29/00) (cc: all counsel) [3:99-cv-01400] (mcl) [Entry date 11/29/00]

12/22/00 93 NOTICE OF APPEAL by defendant Olympic Airways from Dist. Court decision judgment [91-1] Fee status pd [3:99-cv-01400] (mcl) [Entry date 12/26/00]

1/8/03 106 CERTIFIED COPY of USCA Order: affirming the decision of the District Court [93-1] [3:99-cv-01400] (mcl)

3/18/03 113 CERTIFIED COPY of USSC Order: re [93-1]. It is ordered that the mandate of the United States Court of Appeals for the Ninth Circuit, case no. 00-17509, issued on 1/3/03, be, and the same is hereby, recalled and stayed pending receipt of a response and further order of the undersigned or of the Court. [3:99-cv-01400] (mcl) [Entry date 03/24/03]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

00-17509

GENERAL DOCKET

12/28/00 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. Setting schedule as follows: CADS is past due; CADS must be filed no later than 1/4/01 for Kevin R. Sutherland; appellant's designation of RT is due 1/2/01; appellee's designation of RT is due 1/11/01; appellant shall order transcript by 1/22/01; court reporter shall file transcript in DC by 2/21/01; certificate of record shall be filed by 2/28/01; appellant's opening brief is due 4/9/01; appellees' brief is due 5/9/01; appellants' reply brief is due 5/23/01. [00-17509] (gar)

4/26/01 Filed original and 15 copies Appellant Olympic Airways's opening brief (Informal: n) 65 pages; 5 excerpts of record (3 vols.) served on 4/23/01 (minor defcy: need stmt of rel cases) Notified counsel (see next entry). [00-17509] (em)

4/26/01 Received Andrew J. Harakas for Appellant Olympic Airways letter dated 4/25/01 re: attaching notice of errata in brief along with orig & 15 copies of replacement opening brief that incorporates the errata and statement of related cases. [00-17509] (em)

4/26/01 Rec'd errata to brief from Appellant Olympic Airways, served 4/25/01; with accompanying replacement briefs that incorporates the errata. (em)

4/26/01 Filed original and 15 copies Appellant's substitute opening brief of 65 pages; (excerpts in 3 vols. already recvd) originally served on 4/23/01 (note: counsel to send replacement page 65 that contains signature of writing attorney; and 5 copies of vol. 4 of excerpts which were not delivered by printer) [00-17509] (em)

7/11/01 Filed original and 15 copies appellee Isaac Husain's 44 pages brief, 1 5 supp EOR in one vol.; served on 7/11/01 [00-17509] (em)

7/27/01 Filed original and 15 copies Olympic Airways reply brief, (Informal: n) 28 pages; 5 supp EOR in one volume; served on 7/25/01 [00-17509] (em)

2/12/02 ARGUED AND SUBMITTED TO Stephen R. REINHARDT, Raymond C. FISHER, Donald W. Molloy [00-17509] (gb)

12/12/02 FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Donald W. Molloy, author; Stephen R. REINHARDT; Raymond C. FISHER.) FILED AND ENTERED JUDGMENT. [00-17509] (mhf)

1/3/03 MANDATE ISSUED [00-17509] (mhf)

1/9/03 Filed Appellant Olympic Airways's motion to recall the mandate, stay the mandate served 1/8/03 PANEL. [00-17509] [00-17509] (kkw)

1/16/03 Filed Appellees opposition to mtn to recall and stay of mandate served on 1/16/03 PANEL. [00-17509] (kkw)

1/23/03 Filed order (Stephen R. REINHARDT, Raymond C. FISHER & Donald W. Molloy) the motion for recall and stay of the mdt is DENIED. [4623922-1], [4623922-2] [00-17509] (jr)

3/11/03 Filed Supreme Court order (SC Case # 02A751 filed: 3/11/03) Ordering the mandate issued by this court on 1/3/03 to be recalled and stayed pending further order of the USSC. (faxed to panel) Pursuant to USSC order filed 3/11/03, The mandate issued on 1/3/03 is hereby RECALLED and STAYED until further order of USSC. (copy to USDC) [00-17509] (eu)

UNITED STATES DISTRICT COURT

N.D. California

No. C 99-1400 CRB
August 28, 2000

RUBINA HUSAIN, individually and as personal representative of the estate of ABID M. HANSON, M.D.; HANNAH HUSAIN; SARAH HUSAIN and ISAAC HUSAIN, minors, by and through their Guardian ad Litem, RUBINA HUSAIN,

Plaintiffs,

—v.—

OLYMPIC AIRWAYS,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BREYER, District Judge.

On an international passenger flight in January 1998, Dr. Abid M. Hanson, a nonsmoker who suffered from asthma, inhaled a significant amount of second-hand smoke and died in the company of his wife and three children. Dr. Hanson was not seated in the "smoking" section of the airplane on which he died, but in a seat

three rows ahead. Considerable ambient smoke was present at this location. Had Olympic Airways' flight crew responded appropriately to the repeated requests to move Dr. Hanson from this area, he might be alive today.

Plaintiffs Rubina, Hannah, Sarah and Isaac Husain bring this wrongful death action under the liability provisions of the Warsaw Convention. The parties agree that the Warsaw Convention presents plaintiffs' exclusive remedy. Therefore, to determine liability in this case, the Court must decide whether plaintiffs' claim satisfies the requirements of that treaty. Specifically, the Court must decide: (1) whether an "accident" occurred aboard Olympic Airways Flight 417 on January 4, 1998; (2) whether that accident caused the death of Abid Hanson; (3) whether the crew's in-flight actions constituted "willful misconduct"; and (4) to what extent, if any, Dr. Hanson's own negligence contributed to his death.

Plaintiffs filed this suit in state court on December 24, 1998, and defendant removed the case to this Court on March 23, 1999. The Court heard testimony and received evidence in this case on May 30, May 31, and June 1, 2000.[1] After receiving the parties' post-trial briefs, the Court heard final arguments on July 20, 2000. Supplemental letter briefs were submitted shortly thereafter. This memorandum and order shall constitute the Court's findings of fact and conclusions of law in this matter.

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[1] The Court's subject matter jurisdiction over Olympic Airways derives from the Foreign Sovereign Immunities Act, which provides only for non-jury civil actions. 28 U.S.C.A. §§ 1330(a), 1605-

FACTUAL BACKGROUND

I. Dr. Hanson's Medical History

Dr. Abid Hanson was 52 years old in January 1998. For more than two decades prior to his death, Dr. Hanson suffered from asthma. Although Dr. Hanson did not receive regular treatment for his condition, he carried a Proventil/Albuterol inhaler on his person most of the time to assist his breathing. According to the testimony of Dr. Hanson's wife, Ms. Rubina Husain, Dr. Hanson used his inhaler more and more frequently as he aged. Perhaps as a result of his asthmatic condition, Dr. Hanson was particularly sensitive to second-hand cigarette smoke, and he generally tried to avoid smoke-filled areas. Prior to January 4, 1998, Dr. Hanson had never been affected by cigarette smoke during domestic or international air travel.

In addition to his asthma, Dr. Hanson suffered from multiple food allergies. The evidence is somewhat unclear regarding the extent of Dr. Hanson's allergies, or even the particular foods to which he was allergic. A blood test prior to his death indicated that Dr. Hanson was allergic to grapes, yeast and tomatoes. However, Dr. Hanson frequently ate tomato-based dishes at home without incident.

In the two years preceding Dr. Hanson's death, he suffered two notable medical emergencies of unknown origin. In each instance, the incident may have been precipitated by Dr. Hanson's asthma or by an allergic reaction to certain foods. The most serious incident occurred during a family vacation in Las Vegas in December 1996. One evening, Dr. Hanson and his wife spent approximately ten minutes in a smoky restaurant, shared some cheese pizza and a piece of quiche, and

returned to their hotel room. Shortly thereafter, Dr. Hanson began to have trouble breathing. As his breathing difficulties worsened, Dr. Hanson began to turn blue. Ms. Husain performed CPR until the paramedics arrived, at which point Dr. Hanson was administered a shot of epinepherine, a form of adrenaline. After resuscitating Dr. Hanson, the paramedics moved him to the hospital, where he was held overnight. The next morning, Dr. Hanson checked himself out of the hospital against medical advice.

The precise cause of Dr. Hanson's near-fatal experience in Las Vegas is not entirely clear. Although the dry Nevada air or the smoke of the restaurant may have triggered the attack, it was more likely caused by a reaction to certain foods. After reviewing Dr. Hanson's medical records, Dr. Stephen Wasserman, defendant's expert witness, described Dr. Hanson's troubles in Las Vegas as anaphylaxis caused by a severe allergic reaction to food. Plaintiffs' expert, Dr. Jeffrey Golden, agreed, characterizing the episode as "bona fide food-related anaphylaxis."

After the incident in Las Vegas, Dr. Hanson purchased an emergency carrying case containing epinepherine to treat any future attacks. Shortly thereafter, Dr. Hanson experienced a second medical crisis in the summer of 1997, at the home of a friend in Alameda, California. On the evening in question, Dr. Hanson had eaten dinner and then taken a walk outside. Upon Dr. Hanson's return, Ms. Husain noticed that he was having trouble breathing. Fearing that her husband was suffering an asthma attack, Ms. Husain called the paramedics. When they arrived, the paramedics administered oxygen and observed Dr. Hanson for about ten minutes, but did not take him to the hospital. No epinepherine was administered on that occasion.

The cause of Dr. Hanson's breathing problems in Alameda are unknown. Although defendant posits that this second incident was food-related, there is no evidence to support that hypothesis. Equally likely is that the cold dry air which Dr. Hanson breathed during his walk triggered an asthmatic reaction. In either case, the incident in Alameda reveals little about the cause of Dr. Hanson's death aboard Flight 417 six months later.

II. Dr. Hanson's Death

In late 1997, Dr. Hanson, his wife, Rubina Husain, and their three children ("the Husains") traveled from San Francisco to Athens and Cairo for a family vacation. They were accompanied on their trip by family friends, Dr. Umesh Sabharwal, his wife and their children.

Prior to arriving at the airport, the Husains were unaware that Olympic Airways ("Olympic") permitted passengers to smoke cigarettes on international flights. Upon learning for the first time at the New York airport that their flight would include a smoking section, the Husains requested non-smoking seats. On the 12-hour flight from New York to Athens, the Husains were seated toward the middle or front of the aircraft. On the connecting flight to Cairo, the Husains were again seated away from the smoking section of the cabin. No ambient smoke was present at either location. Dr. Hanson experienced no problems breathing on either flight.

The Husain family spent 12 days in Egypt, and embarked on their return trip to the United States on January 4, 1998. According to the testimony of Ms. Husain, the family arrived at the airport early on the day of the return flight because they wanted to ensure that they would be seated in the non-smoking section. After receiving the family's seat assignments, Ms. Husain returned briefly to the counter and showed the check-in

agent a letter signed by Dr. Hanson's brother, also a medical doctor, explaining that Dr. Hanson had a history of asthma. After showing the letter to the agent, Ms. Husain asked the agent to ensure that the family would be seated in the non-smoking section of the plane.

The first leg of the family's return trip was uneventful, but Dr. Hanson began to experience some breathing trouble during a layover in the Athens airport. The layover in Athens lasted approximately three to four hours, and the large room in which the family was seated was filled with cigarette smoke. During the delay, Dr. Hanson used his inhaler more frequently than usual. Because he was bothered by the pervasive smoke, Dr. Hanson attempted to move into the restricted but slightly less smoky area of the first class lounge, but airport officials asked that he move back to the main room.

After the delay, the Husains and the Sabharwals boarded Olympic Airways Flight 417. It was at this time that the Husains first realized that they had been assigned seats at the rear of the airplane cabin, only a few rows in front of the smoking section. The airplane, a Boeing 747, contained a total of 426 passenger seats in 56 rows. Rows one through 13 were designated as business class seats, and rows 14 through 56 were designated as economy class seats. In the economy class, rows 14 through 50 were designated as non-smoking seats. The economy class smoking section began at row 51 and extended to the rear of the cabin. The Husains were seated in row 48 in seats A through E. The Sabharwals were seated nearby. Dr. Husain was seated in seat 48E, just three rows in front of the smoking section. No partition separated the smoking from the non-smoking section.

When the Husains arrived at their seats, Ms. Husain noticed Maria Leptourgou, an Olympic flight attendant,

circulating in the cabin and advising passengers to sit down for takeoff.[2] Ms. Husain approached Ms. Leptourgou and told her that her husband could not sit in a smoking area. Ms. Husain said to Ms. Leptourgou, "You have to move him." The flight attendant paid little attention to Ms. Husain's request, telling her to "have a seat."

Once the plane was fully boarded, but prior to takeoff, Ms. Husain again approached Ms. Leptourgou and asked the flight attendant to move her husband now that all the passengers on the plane were seated. This time Ms. Husain explained that her husband was "allergic to smoke." At trial, Ms. Husain described her pre-takeoff requests to the flight attendant as "adamant." Ms. Leptourgou replied that she could not transfer Dr. Hanson to another seat because the plane was "totally full." The flight attendant also told Ms. Husain that she was too busy at the moment to assist the Husains.[3]

[2] Because Ms. Leptourgou was unavailable to testify at trial and was not deposed for the purpose of this case, the Court never heard her recollection of the events leading up to Dr. Hanson's death. In making its factual findings regarding the conversations between Ms. Husain and the flight attendant, the Court must rely primarily on the testimony of Ms. Husain. The Court finds Ms. Husain's testimony to be quite credible, and notes that her recollection of the events on Flight 417 was largely corroborated by the testimony of Dr. Sabharwal and her children, Isaac and Sarah Husain, as well as much of the uncontradicted evidence.

[3] Defendant objects to Ms. Husain's testimony regarding this conversation, arguing that the statements attributed to Ms. Leptourgou are inadmissible hearsay. The Court permitted the testimony at trial, subject to later consideration of the hearsay question. After due consideration, the Court overrules defendant's objection. Ms. Leptourgou's statements were not offered for their truth, and are therefore not hearsay. *See* Fed.R.Evid. 801. Indeed, plaintiff charges, and the Court finds, that Ms. Leptourgou's statements were in fact untrue. The statements establish not that Flight 417 was full or that the crew was unable to move Dr. Hanson, but that Ms. Leptourgou failed to respond appropriately to Ms. Husain's concerns and entreaties. Moreover, even if the statements were admitted only for their truth, they would still likely be admissible as vicarious admissions of a party-opponent. *See* Fed.R.Evid. 801(d)(2).

The Husains remained in their assigned seats during takeoff, and the first several minutes of the flight passed without incident. Shortly after takeoff, however, the captain turned off the "no smoking" signs, and passengers in the rows behind the Husains began to light cigarettes. From this point on, according to the testimony of Sarah Husain, passengers in rows 51 through 56 were smoking continuously. In addition to those seated in rows 51 through 56, a number of passengers from other rows stood temporarily in the aisles behind the Husains, smoking and socializing. As a result, smoke was both pervasive and constant.

As soon as the smoking began, the Husains were surrounded by ambient smoke which had floated forward into their row. When the smoke began to linger in row 48, Dr. Hanson gestured to his wife and complained that the smoke was "like a chimney." Ms. Husain then stood up and contacted Ms. Leptourgou for a third time. This time, Ms. Husain told the flight attendant, "You have to move my husband from here." Again, Ms. Leptourgou curtly refused, stating that the plane was full. Ms. Leptourgou indicated to Ms. Husain that Dr. Hanson could switch seats with another passenger, but that, in order to do so, Ms. Husain would have to walk through the cabin and ask other passengers herself. She could not enlist the assistance of the flight crew in changing her husband's seat. Ms. Husain, becoming more desperate and more adamant, told the flight attendant that her husband *had* to move, even if the only available seat were in the cockpit or the first class area of the cabin. The flight attendant, however, was equally resolute. She offered no

assistance. Finally, Ms. Husain, seeing no hope for accommodation, returned to her seat.

Unbeknownst to the Husains, Flight 417 was actually not full. In fact, the flight contained eleven empty passenger seats.[4] The cabin had a capacity of 426 seats, 44 of which were located in business class and 382 of which were located in economy class. Four of these seats, located in a row immediately behind the smoking section, were designated as "crew rest" seats. Only 411 passengers traveled on Flight 417 on January 4. Therefore, the flight had eleven unoccupied seats, not including those designated for crew rest. Two of those empty seats were located in the business class section of the cabin.

In addition to the unoccupied seats, Flight 417 carried 28 "non-revenue passengers." Non-revenue passengers include employees and relatives of employees of Olympic Airways and other airlines. Of these 28 passengers, eleven were seated in the cabin's smoking sections. Of the remaining 17 non-revenue passengers, two were seated in rows one and two in business class and 15 were seated in rows 15 through 36 in economy class.

As the flight progressed, ambient smoke continued to circulate in the area of row 48. Approximately two hours into the flight, the crew served a meal. The evidence before the Court establishes that Dr. Hanson ordered a meal and that he ate some portion of it. He also shared some of his food with his daughter, Sarah, and with a

[4] There was some confusion at trial concerning the number of empty seats and how many of them were located in the non-smoking section of the plane. The Court's finding that there were eleven empty seats on the flight is supported by the flight's passenger manifest, the testimony of Captain Karayannis, and Olympic's admissions during discovery. Unfortunately, the evidence did not establish the precise location of these seats on the plane or how many of them were located in the non-smoking section.

woman seated to his right. According to Sarah, Dr. Hanson "wasn't really eating that much" of his meal.

Immediately after the meal service, smoking increased noticeably in the rows behind the Husains. Around this time, Dr. Hanson became unusually quiet. At some point shortly after the meal, Dr. Hanson asked his wife for a new inhaler, indicating that the one he had been using had emptied. Ms. Husain retrieved a full inhaler from the overhead bin. Dr. Hanson turned around several times to look at the smoke in the rows behind him. He then told Sarah that the smoke was bothering his allergies, and decided to move toward the front of the cabin to bre :the fresher air.

Sarah notified her mother of Dr. Hanson's discomfort, and Ms. Husain followed him to the front of the aircraft. Dr. Hanson walked forward a number of rows, stopping in the galley area between rows 19 and 20, well into the non-smoking area. When Ms. Husain reached him, he was leaning against a chair near the galley area. Dr. Hanson gestured to Ms. Husain to get the epinepherine that he carried in his emergency kit, which Ms. Husain had stored in a carry-on bag. Ms. Husain rushed to the rear of the plane to retrieve the epinepherine, then returned to the galley area and administered a shot to her husband in a pre-measured syringe.[5] She then ran to the rear of the cabin to wake Dr. Sabharwal.

Within seconds, Dr. Sabharwal, who, by chance, was an allergy specialist, arrived at the front of the plane to assist. Noticing that Dr. Hanson was in respiratory distress, Dr. Sabharwal pulled him onto the floor, gave him another shot of epinepherine (.20 ccs), and began to

[5] The parties agree that the epinepherine administered to Dr. Hanson on Flight 417 was fresh and had been properly maintained.

administer CPR.[6] At this point, Dr. Hanson's pulse was barely palpable. Dr. Sabharwal noticed that, while Dr. Hanson's lower airways were obstructed, his upper airway was not. For this reason, he was able to push some air into Dr. Hanson's lungs during the administration of CPR. During the treatment, Dr. Sabharwal also gave Dr. Hanson a shot of Bricanyl, which had been retrieved from the Husains' emergency kit.

At some point during this period, Ms. Husain requested that one of the flight attendants provide an oxygen canister and mask for her husband. According to Ms. Husain's testimony, two flight attendants attempted to open the oxygen canister, but were unable to do so.[7] Ms. Husain summoned Sarah, who was walking toward the front of the aircraft, and asked her to retrieve Dr. Hanson's oxygen canister with its nasal canula from the family's emergency kit. Sarah relayed this message to her brother, Isaac, who brought the oxygen to Ms. Husain.

As they attempted to resuscitate Dr. Hanson, Dr. Sabharwal and Ms. Husain administered oxygen through a nasal canula. In addition, oxygen may have been admin-

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[6] Although it is not entirely clear exactly how many shots of epinepherine Dr. Hanson received during the trauma that preceded his death, the testimony of Dr. Sabharwal, Ms. Husain, Isaac Husain and Sarah Husain confirm that at least two shots were administered, the first by Ms. Husain and the second by Dr. Sabharwal.

[7] The testimony regarding oxygen administration was entirely contradictory. Rubina and Isaac Husain both testified that the flight attendants were arranging an oxygen canister, but that they were unable to administer oxygen to Dr. Hanson. Ms. Husain, Dr. Sabharwal and Olympic flight attendant Eleni Xourgia all testified that Dr. Hanson was administered oxygen at some point during the incident with equipment obtained from the Husains' emergency kit. Theocharis Fotiades and Nikolaos Belkas testified that oxygen was supplied through Olympic's canister and mask.

istered through Olympic's canister with an attached mask. However, because Dr. Hanson was not able to breathe spontaneously, Dr. Sabharwal determined that the oxygen was not useful. About five minutes after Dr. Sabharwal arrived on the scene, the Olympic flight crew brought him a medical kit. By this point, however, Dr. Sabharwal believed that only a fully-equipped medical crash kit could save Dr. Hanson's life.

As time passed, a few other passengers arrived in the galley to assist Dr. Sabharwal, but no one was able to save Dr. Hanson. At approximately 4:40 p.m. Greenwich Mean Time, Dr. Sabharwal announced that Dr. Hanson had died.

During the entire incident, the airplane's captain never turned on the "no smoking" sign or otherwise requested that the passengers in the rear of the plane stop smoking.

III. The Medical Causes of Dr. Hanson's Death

For religious reasons, no autopsy was performed on Dr. Hanson's body after his death, and the direct cause of his fatal attack is a matter of some dispute. Plaintiffs argue that Dr. Hanson's death was caused by a severe asthma attack brought on by inhalation of cigarette smoke. Defendant, on the other hand, argues that Dr. Hanson died as a result of anaphylaxis caused by an allergic reaction to food, or that he died as a result of some other unknown medical problem. As discussed below, the Court finds that plaintiff has established by a preponderance of the evidence that smoke ingestion during the first two hours of Flight 417 was a primary cause of Dr. Hanson's death.

Anaphylaxis is an allergic emergency which may be caused by an allergy to external material. Symptoms of anaphylaxis include skin discoloration, obstruction of the upper airway, disturbance in the intestinal tract, drop

in blood pressure, shock or rapid, ineffective heartbeat. An asthmatic attack, on the other hand, is a reversible narrowing of the airway caused by air pollutants or other irritants, such as cigarette smoke.

The symptoms of asthma and anaphylaxis overlap significantly. Indeed, some severe asthma attacks may be characterized as anaphylactic reactions. In this case, the course of events with respect to the timing of the meal, Dr. Hanson's smoke inhalation, and the onset of his reaction support theories labeling the cause of death as both anaphylaxis and asthma. Both anaphylaxis and asthma attacks produce the same symptoms in the lower airway. Either can result in death. Epinepherine can be used to treat both anaphylaxis and asthma, but it is not necessarily efficacious in either case. The fact that Dr. Hanson received two or more injections of epinepherine during the flight and that the drug had no effect does not assist the Court in arriving at a cause of death.

Although anaphylaxis and asthma are sometimes difficult to differentiate, the Court finds that smoke played a significant causal role in Dr. Hanson's death. As both Dr. Golden and Dr. Wasserman acknowledged, cigarette smoke can act as an irritant. Moreover, the greater an individual's exposure to smoke, both in terms of time and intensity, the greater the irritant effect. As Dr. Golden explained in his testimony before the Court, the presence of an irritant can cause bronchospasm, constricting an individual's airways.

The Court finds significant the testimony of the Husain family and Dr. Sabharwal regarding Dr. Hanson's behavior in the Athens airport. During the hours-long delay in Athens, Dr. Hanson used his inhaler frequently and was increasingly bothered by the prevalent smoke. To escape the effects of the smoke, Dr. Hanson illicitly entered the first class lounge, where the air quality was

slightly better. Dr. Hanson's problems in Athens indicate his sensitivity to smoke on the day in question.

Once the family was airborne toward New York on Flight 417, but prior to the in-flight meal service, Dr. Hanson again complained about the smoke. During the first hours of the flight, Dr. Hanson used his inhaler to remedy the effects of the smoky air while aboard the plane.[8] The Court cannot credit defendant's suggestion that Dr. Hanson's breathing problems prior to the meal were causally unrelated to his later asphyxiation. The evidence before the Court suggests exactly the opposite conclusion. Dr. Hanson explicitly complained that smoke was affecting his breathing just hours before his death, complained to his wife about the level of cigarette smoke on the plane, and relied extensively on his inhaler for support during the hours leading to his fatal attack. To conclude, as defendant urges, that the smoke on Flight 417 did not trigger Dr. Hanson's death is to ignore the chain of events leading up to his attack.

Defendant introduced evidence at trial to establish that Dr. Hanson may have died as a result of an anaphylactic reaction to yeast, tomatoes or grapes in the in-flight meal. This contention is belied by several facts in the record. First, there is no evidence that Dr. Hanson ate any grapes, tomatoes or bread-based products on the flight. In fact, the only credible evidence regarding Dr. Hanson's food intake was the testimony of his daughter, Sarah. According to Sarah, Dr. Hanson received a meal on the flight, but did not eat the whole thing, and in fact

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[8] Although the Court heard no direct evidence that Dr. Hanson used his inhaler on the flight, the evidence shows that he was bothered by the smoke, and that he asked his wife for a new inhaler because the inhaler in his possession had become empty. In light of the fact that Dr. Hanson frequently relied on his inhaler to remedy the adverse effects of ambient smoke, the Court finds that he used his inhaler while aboard Flight 417.

shared it with both of his neighbors. No witnesses testified that they observed Dr. Hanson eating any of the foods to which he was allergic while seated in row 48. Without further evidence of Dr. Hanson's sensitivities and his food intake aboard the flight, the Court cannot conclude that his death was caused by a reaction to the food.

Further, Dr. Hanson's death lacked certain symptoms that frequently appear in cases of anaphylaxis. Anaphylaxis caused by oral injection of an allergen commonly causes swelling in the upper airway. In this case, Dr. Sabharwal observed that Dr. Hanson's upper airway was not obstructed. Anaphylaxis frequently, but not always, causes discoloration, redness and hives on a victim's chest and neck. Dr. Sabharwal noticed none of those symptoms in this case.

Moreover, the testimony of Dr. Sabharwal, the only doctor who actually treated Dr. Hanson during his trauma, supports the Court's conclusion. While Dr. Sabharwal testified that he could not definitively diagnose the cause of Dr. Hanson's death, he did offer a differential diagnosis, assessing the likely causes of death in order of their probability. Dr. Sabharwal opined that, in light of Dr. Hanson's asthma and the obstruction of Dr. Hanson's airways, he most likely died as a result of status asthmaticus, or "totally uncontrolled asthma." The second most likely cause of death, according to Dr. Sabharwal, was anaphylaxis, and the third was "cardiac problems." Failing each of these potential causes, Dr. Sabharwal concluded that Dr. Hanson's death may have been precipitated by unknown causes.

Dr. Golden's testimony further supports the Court's factual findings regarding the cause of Dr. Hanson's death. Dr. Golden testified that, in the absence of food, the only possible cause of death in this case would be an

asthmatic reaction. Because Dr. Hanson may have eaten some of his meal, Dr. Golden concluded that it is difficult to distinguish whether Dr. Hanson's condition was anaphylaxis or asthma. However, Dr. Golden was able to conclude that smoke was a significant contributing factor in Dr. Hanson's death, regardless of whether he ate a meal on Flight 417.

Dr. Wasserman, defendant's expert witness in this case, attributed Dr. Hanson's death to asphyxiation or heart failure brought on by a reaction to an allergen, possibly tomatoes or yeast. Even Dr. Wasserman acknowledged, however, that cigarette smoke may have contributed to Dr. Hanson's death, although he was unable to determine the extent of that contribution.

In conclusion, the Court finds that Dr. Hanson's death was the result of respiratory distress which was caused by an exacerbation of his asthmatic condition due to the prolonged and extensive exposure to second-hand smoke on Olympic's Flight 417.

DISCUSSION

I. Applicable Law: The Warsaw Convention

This case is governed by the provisions of the Warsaw Convention[9] ("the Convention"). The Convention is a comprehensive international treaty governing the liability of carriers in "all international transportation of persons, baggage or goods." 49 U.S.C. § 40105. The purposes of the Convention were to achieve uniformity and to limit the liability of air carriers. *See El Al Israel Air-*

[9] The Warsaw Convention is the popular name for the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), note following 49 U.S.C. § 40105.

lines v. Tseng, 525 U.S. 155, 119 S.Ct. 662, 671-72, 142 L.Ed.2d 576 (1999); *Carey v. United Airlines, Inc.*, 77 F.Supp.2d 1165, 1169 (D.Or.1999). The parties agree that, because Dr. Hanson's death occurred during international travel, the Convention provides plaintiffs' exclusive remedy. *See Tseng*, 119 S.Ct. at 668. ("[R]ecovery for a personal injury suffered 'on board [an] aircraft or in the course of any of the operations of embarking or disembarking,' if not available under the Convention, is not available at all.").

The Convention provides for strict liability for carriers in certain situations, and precludes liability altogether in others. Article 17 of the Convention explains that a carrier "shall be liable" for death or bodily injuries of passengers sustained during flight as the result of an "accident." Articles 20 and 22 limit a carrier's liability under Article 17 to $75,000 per passenger. However, under Article 25, the $75,000 limitation does not apply if the carrier has committed "wilful misconduct."[10] *See generally Hermano v. United Airlines*, 1999 WL 1269187 (N.D.Cal. Dec. 21, 1999).

II. The "Accident" Requirement

Article 17 of the Convention provides that

> The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft during the course of any of the operations of embarking and disembarking.

[10] This term is more commonly spelled today as "willful misconduct." For the purposes of this memorandum, the Court will use the modern spelling except for direct quotations.

49 U.S.C. § 40105. The Supreme Court has interpreted this language to require the occurrence of an "accident" for a carrier to be held liable under the Convention. *See Air France v. Saks*, 470 U.S. 392, 396, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985).

In *Saks*, the Supreme Court defined "accident" as "an unexpected or unusual event or happening that is external to the passenger." *Saks*, 470 U.S. at 405, 105 S.Ct. 1338. The Court noted that "accident," as that term is used in the Convention, has a narrower definition than the term "occurrence." *Id.* at 398, 105 S.Ct. 1338. This inquiry is an objective one, and does not focus on the perspective of the person experiencing the injury. *See Gotz v. Delta Airlines, Inc.*, 12 F.Supp.2d 199, 201 (D.Mass.1998). Further, "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident." *Saks*, 470 U.S. at 406, 105 S.Ct. 1338. It is the cause of the injury, not merely the occurrence of the injury, that must qualify as an accident. *See id.* at 399, 105 S.Ct. 1338; *Gotz*, 12 F.Supp.2d at 201.

Despite these limitations, the Court emphasized that its definition "should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." *Id.* at 405, 105 S.Ct. 1338. Other courts have also concluded that the term "accident" should be "interpreted broadly." *See Carey*, 77 F.Supp.2d at 1170.

The Supreme Court has also explained that, while the "accident" must cause the passenger's injury, it need not be the *sole* causal factor. *Saks*, 470 U.S. at 405, 105 S.Ct. 1338. Rather, because "any injury is the product of a chain of causes," a plaintiff under the Convention need only "prove that some link in the chain was an unusual or unexpected event external to the passenger," *Id.* at 406, 105 S.Ct. 1338.

In this case, plaintiffs posit three specific occurrences aboard Flight 417 that might be construed as "accidents" contributing to Dr. Hanson's death: (1) Ms. Leptourgou's three refusals to move Dr. Hanson to another seat; (2) the flight crew's inability to provide a usable oxygen canister in a timely manner; and (3) and the captain's failure to turn on the "no smoking" sign during Dr. Hanson's attack. As discussed below, the Court concludes that only the first of these occurrences was an "accident" which caused Dr. Hanson's death.

A. Refusal to Move Dr. Hanson

Plaintiffs first argue that Ms. Leptourgou's refusal to transfer Dr. Hanson to another row and her failure to follow company procedure was an "unusual" or "unexpected" event. The Court agrees.

The negligent failure of the flight crew to appropriately serve the needs of an ailing passenger can be considered an "accident" under the Convention. *See Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 142 (2d Cir.1998) (flight attendant negligently spilled scalding water on passenger while attempting to attend to passenger's earache). A claim "does allege an accident if it arises from some inappropriate or unintended happenstance in the operation of the aircraft or airline. Thus, an injury resulting from routine procedures in the operation of an aircraft or airline can be an 'accident' if those procedures or operations are carried out in an unreasonable manner." *Id.* at 143; *see also Schneider v. Swiss Air Transport Company Ltd.*, 686 F.Supp. 15 (D.Me.1988) (finding possible accident where flight attendant refused to assist passenger by asking other passengers sitting in front of her to raise their seats); *Langadinos v. American Airlines, Inc.*, 199 F.3d 68, 71 (1st Cir.2000) (finding possible accident where flight attendant imprudently

served alcohol to a passenger whose behavior was already "erratic" and "aggressive"); *Carey*, 77 F.Supp.2d at 1171 (flight attendant's "acts of preventing plaintiff and his children from changing seats, engaging in heated, argumentative exchanges with plaintiff, informing him that he could be arrested if he did not stay in his seat and if his children did not stay in their seats, and publicly humiliating him, meet the definition of 'accident' as articulated in *Saks*.").

Defendant argues that no unusual event occurred during the Husains' flight. According to defendant, ambient smoke is an expected and usual aspect of international flying. *See Warshaw v. Trans World Airlines, Inc.*, 442 F.Supp. 400 (E.D.Pa.1977) (routine repressurization of cabin was not an accident, even though it caused plaintiff to lose his hearing); *Saks*, 470 U.S. at 394, 105 S.Ct. 1338 (routine cabin pressurization during landing is not an accident); *Gotz*, 12 F.Supp.2d 199 (injury to passenger during attempt to stow baggage in overhead compartment was not accident, because crew "worked perfectly").

The Court does not dispute that smoke in the cabin may be an expected aspect of international travel. Indeed, it is clear from the record that the Husains knew before boarding that the January 4 flight would have a smoking section. However, defendant's argument misses the mark. The smoke in the cabin was not the "unusual" or "unexpected" event which caused Dr. Hanson's death, although, as detailed above, the smoke undoubtedly had a significant place in the causal chain. Rather, the unusual and unexpected event on which plaintiffs base their claim was the failure of the flight attendant to adequately respond to Ms. Husain's transfer requests. Indeed, in both *Warshaw* and *Gotz*, in which the courts found that injuries not attributable to unusual aircraft

operations were not actionable under the Convention, the courts specifically mentioned that the injured passengers had *failed to request assistance from the flight crew.* In this case, the opposite is true. With increasing urgency, Ms. Husain three times requested the crew's assistance prior to her husband's death, and her request was thrice denied.

Under no reasonable interpretation of the facts can one conclude that Ms. Leptourgou's failure to assist Dr. Hanson was expected or usual. The Court has heard extensive testimony on the standard of care for flight attendants in situations such as this, and concludes that Ms. Leptourgou acted in an unexpected and unusual manner in several respects.

First, the recognized standard of care for flight attendants during international air travel demands that a flight attendant make efforts to accommodate a passenger who indicates that he or she needs to be moved for medical reasons. In this case, despite Ms. Leptourgou's repeated statements that the flight was full, eleven seats stood unoccupied. The Court can conceive of no acceptable reason for Ms. Leptourgou's refusal to assist Dr. Hanson after Ms. Husain's second and third requests. Moreover, according to Diane Fairechild, a flight attendant with 21 years of experience in international travel, even if the flight had no empty seats in the economy section, the crew should have transferred Dr. Hanson to an empty seat in the business class section of the cabin. Notably, Ms. Husain's suggestion to this effect during her third plea for a seat change went unheeded by Ms. Leptourgou.

Ms. Xourgia, now a chief cabin attendant working for Olympic, testified that, if she were in Ms. Leptourgou's position at the time of Ms. Husain's third request (i.e., after takeoff, when smoking had commenced in row 51),

she would have transferred Dr. Hanson "immediately." Ms. Fairechild, testified that, according to recognized industry standard of care, Ms. Leptourgou "should have absolutely responded" to Ms. Husain's requests.

Second, even if the flight were entirely full, the flight attendant should have attempted to move Dr. Hanson. Ms. Fairechild testified that, when faced with a medical request like Ms. Husain's during a full flight, the crew will often attempt to entice other passengers to switch their seats. In this case, a seat transfer would not have been difficult to effectuate, considering that 17 passengers seated in the cabin's non-smoking section were "non-revenue" passengers. The evidence reveals that such a transfer would be appropriate under the controlling standard of care. Even Theocharis Fotiades, the chief cabin attendant on Flight 417, explained that Ms. Leptourgou should "definitely" have attempted to find another seat for Dr. Hanson when Ms. Husain made her requests.

Third, not only did Ms. Leptourgou's failure to act violate the accepted industry standard of care, it also violated Olympic Airways' policy. As Mr. Fotiades testified at trial, Olympic crew members generally make efforts to move passengers who become ill during flights if moving those passengers will assist in their recovery. Mr. Fotiades explained that this policy applies when a passenger must be moved because of smoke-related illness. Further, according to Mr. Fotiades, Olympic flight attendants are familiar with this policy. Ms. Leptourgou, however, entirely ignored it. Such behavior cannot be considered either expected or usual.

Fourth, even if Ms. Leptourgou did not personally assist Dr. Hanson to find a new seat, Olympic policy required that she, at least, alert the chief cabin attendant ("CCA") of Ms. Husain's medical requests. Ms. Xourgia testified that as a flight attendant in Ms. Leptourgou's

position, she would have immediately contacted the CCA when Ms. Husain requested a seat change prior to takeoff. Although no written policy was placed into evidence by the parties, Ms. Xourgia testified that written Olympic policies require that when a passenger indicates that he needs to be moved for a medical reason, the flight attendant must report that request to the CCA.

In this case, Ms. Leptourgou did not contact the chief cabin attendant to alert him to Dr. Hanson's medical condition or Ms. Husain's requests. In fact, according to the evidence before the Court, Ms. Leptourgou did not contact any other members of the flight crew concerning Ms. Husain's three requests. Nor did she ask another member of the crew whether or not the flight was full. Mr. Fotiades, the chief cabin attendant, did not learn about Ms. Husain's requests for a seat change until after Dr. Hanson had died. Had he learned of the requests earlier in the flight, Mr. Fotiades testified that he would have made further inquiries and attempted to move Dr. Hanson to another seat.

Finally, because of Ms. Husain's precautionary actions in both the New York and the Cairo airports, Ms. Leptourgou's failure to assist Dr. Hanson is even more unexpected and unusual than in the typical case of a passenger transfer request. At the New York airport where the Husains first learned that Olympic permitted smoking on its flights, Ms. Husain informed the check-in agent that her husband was "susceptible to smoke" and could not "be in any smoke." As a result of this initial conversation, the Husains had reason to expect that Olympic was aware of Dr. Hanson's sensitivity to smoke. This expectation was further bolstered by Ms. Husain's conversation with the check-in agent at the Cairo airport prior to the family's return trip. After the Husains were given their tickets in Cairo, Ms. Husain returned to the

counter to ensure that her husband had been given a seat in the non-smoking sections of the two return flights. At that time, Ms. Husain showed the agent a letter from Dr. Hanson's brother explaining that Dr. Hanson had a history of asthma. Again, one would expect that, as a result of this conversation, Olympic was aware of Dr. Hanson's medical needs. In light of this fact, Olympic's subsequent failure to move Dr. Hanson after three requests is even more unusual and unexpected.

Moreover, Dr. Hanson's expectation that Ms. Husain's requests would be accommodated was even more reasonable in light of the normal operating procedures of international carriers. Diane Fairechild testified that medical information and special requests like Ms. Husain's are normally inputted in a "special information log," which is given to the airplane's CCA prior to takeoff. The log serves to inform the CCA of the special needs of the passengers. In this case, despite Ms. Husain's warnings to Olympic check-in agents regarding her husband's condition, nothing to that effect appeared in Olympic's special information log. A passenger in Dr. Hanson's position should expect that medical needs expressed to an agent prior to check-in will be considered once the flight has been boarded. In Dr. Hanson's case, that reasonable expectation was not met.

In sum, Ms. Leptourgou's behavior was far from usual or expected. She violated the industry standard of care, she misrepresented to Ms. Husain that the flight was full, and she acted in contravention of accepted Olympic Airways policy. This aberrant behavior was both unexpected and unusual.

In the face of this evidence, defendant analogizes to a number of published cases in which the Convention's "accident" requirement was narrowly applied. For instance, defendant relies on *Margrave v. British Air-*

ways, 643 F.Supp. 510 (S.D.N.Y.1986), in which the district court noted that sitting in "a very cramped position" during a flight delay is neither unusual nor unexpected. The plaintiff in *Margrave* sat in her seat for approximately five hours while her plane waited for takeoff. Because "normal travel procedures" were followed by the crew, the court concluded that no "accident" had occurred. *Id.* at 512. Defendant argues that, under *Margrave*, sitting in an assigned seat cannot be considered an "accident," even if remaining seated causes injury to the passenger. However, *Margrave* is distinguishable from the instant case. In *Margrave*, the plaintiff never told a flight attendant about her discomfort. *Id.* at 511. In contrast, here the unusual event was not Dr. Hanson's seat location, but the flight attendant's refusal to accommodate his needs despite three requests.

Defendant also cites a number of cases in which the crew's failure to assist an ailing passenger was held to not constitute an "accident." For instance, in *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir.1997), the Eleventh Circuit held that an airplane crew's negligent decision to continue a flight to its scheduled destination despite a passenger's in-flight heart attack was not an actionable "accident" under Article 17. *See also McDowell v. Continental Airlines*, 54 F.Supp.2d 1313, 1320 (S.D.Fla.1999) (reluctantly following *Krys*); *Fischer v. Northwest Airlines, Inc.*, 623 F.Supp. 1064, 1065 (N.D.Ill.1985) (refusal to aid passenger with heart attack was not "accident"). *But see Seguritan v. Northwest Airlines, Inc.*, 86 A.D.2d 658, 446 N.Y.S.2d 397, 398-99 (1982) ("The 'accident' is not the heart attack suffered by the decedent. Rather, it is the alleged aggravation of decedent's condition by the negligent failure of defendant's employees to render her medical assistance.").

The seminal case in this line of "failure to assist" decisions is *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130 (3d Cir.1984). In *Abramson*, the plaintiff was suffering from a preexisting paraesophagael hiatal hernia when he boarded the flight. The plaintiff's condition worsened during the flight, and he asked the flight attendant if he could lie down in empty seats so that he could apply a useful "self help" remedy which included massaging his stomach and occasionally inducing vomiting. *Id.* at 131. The court found that no accident had occurred because the aggravation of the passenger's injury was not an unusual or unexpected occurrence. *Id.* at 132. The court noted that "[i]n the absence of proof of abnormal external factors, aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an 'accident' within the meaning of Article 17." *Id.* at 133.

Each of these cases, including *Abramson*, is distinguishable from the one at bar. Unlike Dr. Hanson, the passengers in each of the cited cases suffered an injury as a result of entirely "internal" forces. While the inaction of the crew may have aggravated the passengers' injuries, it did not precipitate the injuries as such. Here, on the other hand, the flight attendant's failure to transfer Dr. Hanson—or her failure to at least follow the proper procedures—*precipitated* Dr. Hanson's injury and death. *See Fishman*, 132 F.3d at 141-142 (distinguishing *Abramson* and *Fischer* on similar grounds).

Additionally, none of the cases cited by defendant arose from a crew member's blatant disregard of industry standards and airline policies. As described above, the testimony in this case indicates that Ms. Leptourgou's actions were anything but usual. When a passenger boards an airplane, he or she should be able to expect

that the flight crew will comply with accepted procedures and rules. A failure to do so is unexpected.

Finally, to the extent that any of defendant's cited cases are not distinguishable from the instant case, the Court finds that they are both unconvincing and non-binding in this Circuit. The Court finds little merit in the notion that a flight crew has no legal obligation to care for its ill or endangered passengers. The practical effect of cases like *Abramson* is to dissolve the airlines' duty of care and to "create[ ] an incentive to airlines engaged in international travel not only not to exercise the highest degree of care but to completely refuse to treat" or assist passengers with medical problems. *McDowell*, 54 F.Supp.2d at 1320. In the absence of binding authority, the Court declines to adopt such a rule.[11]

The Court concludes that when a flight attendant's acts create a foreseeable risk of injury to passengers, an "accident" has occurred. *See Langadinos*, 199 F.3d at 71. In this case, Ms. Leptourgou's failure to respond appropriately to Ms. Husain's requests and her failure to comply with the applicable standards of care were both "unexpected" and "unusual." *See Tsevas v. Delta Air Lines, Inc.*, 1997 WL 767278 (N.D.Ill. Dec. 1, 1997) (flight attendant's failure to move passenger upon request in order to keep her away from a second passenger's lewd behavior was an "accident" under Article

[11] Additionally, the Court cannot turn a blind eye on the sudden sea change in interpretation of the Convention that has occurred in the wake of the Supreme Court's recent decision in *Tseng, supra*. In reaching its conclusions of law in this case, the Court agrees with the *McDowell* court that cases such as *Abramson* and *Krys* create "absurd results" in the wake of *Tseng*. *McDowell*, 54 F.Supp.2d at 1319. Viewed in the proper context, the holdings of these pre-*Tseng* cases are less than compelling. *See generally McDowell*, 54 F.Supp.2d at 1319 (discussing the effect of *Tseng* on Warsaw Convention jurisprudence).

17). Therefore, Ms. Leptourgou's behavior is actionable under the Warsaw Convention.

1. Olympic's Refusal to Move Dr. Hanson Caused His Death

Having concluded that Ms. Leptourgou's failure or refusal to assist Dr. Hanson constituted an "accident," the Court must next consider whether that "accident" caused Dr. Hanson's death. As discussed above, the coincidental occurrence of both an accident and an injury aboard an international flight does not necessarily support a cause of action under the Convention. To prevail, plaintiffs must establish that the accident *caused* the injury. *Gotz*, 12 F.Supp.2d at 201. In *Saks*, the Supreme Court recognized that "any injury is the product of a chain of causes." *Saks*, 470 U.S. at 406, 105 S.Ct. 1338. To establish liability, a plaintiff need only "prove that some link in the chain was an unusual or unexpected event external to passenger." *Id.* Courts have traditionally applied regular proximate cause analysis to determine carrier liability under the Convention. *See Margrave*, 643 F.Supp. at 512.

In light of this standard, the Court finds that Olympic's failure to move Dr. Hanson caused Dr. Hanson's death. As discussed above, Dr. Hanson's death was caused, at least in significant part, by smoke inhalation which triggered a severe asthmatic reaction. Dr. Hanson was seated in row 48, only three rows in front of the designated smoking section. Four witnesses at this trial were seated in Dr. Hanson's vicinity on Flight 417, and all four noted that the ambient smoke was noticeably thick in row 48. At several points in the flight, Dr. Hanson indicated his discomfort with the seating arrangement. As noted above, Ms. Leptourgou or another member of the Olympic crew could have moved Dr.

Hanson to any of the eleven empty seats on the plane or to one of the 17 non-smoking seats occupied by non-revenue passengers. If Ms. Leptourgou had moved Dr. Hanson out of the vicinity of the smoking section, he would not have died aboard Flight 417. Therefore, the Court must conclude that Dr. Hanson's death was caused by an accident, triggering liability under the Warsaw Convention.

B. Administration of Oxygen

In addition to Ms. Leptourgou's failure to move Dr. Hanson to another seat, plaintiffs argue that two other "accidents" occurred aboard Flight 417 which caused Dr. Hanson's death. First, plaintiffs assert that defendant's failure to effectively administer oxygen to Dr. Hanson through a face mask should be considered an "accident" under the Convention. According to plaintiffs, Dr. Hanson may not have died if the flight crew had properly prepared and supplied oxygen during Dr. Hanson's fatal attack.

To resolve this question, the Court must engage in a three-step inquiry. First, the Court must decide whether, as a purely legal matter, the failure to properly administer oxygen can be considered an accident. Second, the Court must decide as a factual matter whether the acts of the flight crew in this case constituted an unexpected or unusual event. If so, the Court must finally determine whether the flight crew's acts caused Dr. Hanson's death.

Turning first to the legal issue, the Court is aware of two published cases which address the question of whether an airline may be held liable under the Convention for the failure to properly administer oxygen. In *Tandon v. United Air Lines*, 926 F.Supp. 366 (S.D.N.Y.1996), the plaintiff suffered a heart attack during an international flight. When a doctor attempted to

administer oxygen from the airplane's on-board canister, he discovered that the canister had expired two month's earlier, and that it contained insufficient oxygen supply. *Id.* at 368. The plaintiff did not receive proper care, and died aboard the flight. The district court found that, because no unusual or unexpected event external to the plaintiff had *triggered* the plaintiff's heart attack, the later failure of the defendant to save her did not constitute an accident. *Id.* at 369.

The Court declines to follow the rule enunciated in *Tandon*. The Court cannot agree with the *Tandon* court that an expired oxygen container or a negligently maintained medical kit can somehow be considered an "expected" or "usual" aspect of international flight. Rather, the Court adopts the reasoning of the district court in *McDowell v. Continental Airlines*, 54 F.Supp.2d 1313 (S.D.Fla.1999). In *McDowell*, the court noted that improper maintenance of a carrier's on-board medical equipment can be considered an "accident." 54 F.Supp.2d at 1318. In determining whether an accident had occurred, the court considered the carrier's level of care in maintaining the medical kit and the carrier's compliance or noncompliance with federal regulations and industry standards. *Id.* at 1318. Although the court in *McDowell* concluded that the plaintiff had failed to establish facts showing negligent maintenance of the on-board medical kit, the court's discussion is instructive. Therefore, the Court holds that the failure to properly maintain or administer oxygen to an ailing passenger aboard an international flight may be considered an accident.

The Court must next apply this legal conclusion to the facts of this case. As described above, the testimony on this subject is contradictory at best. Both Dr. Sabharwal and Ms. Husain testified that the Olympic crew members

were unable to provide bottled oxygen with an attached mask, while members of the crew testified that they did, in fact, provide an oxygen mask and canister, and that the apparatus functioned properly. Mr. Fotiades was particularly adamant in his testimony that he observed Dr. Hanson breathing oxygen through an Olympic-supplied mask at some point during the incident.

In light of this conflicting testimony, the Court finds that the evidence on the question of the oxygen administration is inconclusive. While the flight crew may have had some trouble preparing the oxygen when first asked by Ms. Husain, it is far from clear that the Olympic oxygen canister and mask were not used on Dr. Hanson or that the delay during the flight crew's troubles lasted more than a few moments. The Court notes that the time period between Ms. Husain's first request for oxygen and Dr. Hanson's death was approximately ten minutes. During a significant portion of that time, Dr. Sabharwal and Ms. Husain were administering CPR, making the availability of oxygen irrelevant. In the flurry of intense activity that preceded Dr. Hanson's death, it is possible that both Ms. Husain and Dr. Sabharwal failed to notice that Olympic's oxygen tank was in use.

Additionally, even if the flight crew did have some trouble preparing the oxygen canister, the Court cannot find that an accident necessarily occurred. In the heat of the moment, a certain amount of fumbling is normal and expected, even by experienced flight attendants. Plaintiffs have not established that the flight crew's problems providing an oxygen canister lasted for a significant period of time.

In sum, the Court finds that plaintiffs have failed to meet their burden of establishing that the flight crew's behavior in preparing the oxygen was unusual or unexpected. Therefore, the Court concludes that the flight

crew's acts during Dr. Hanson's fatal attack did not constitute an accident.

Further, even if the acts of the flight crew could be described as an "accident," the Court finds as a matter of fact that any failure to properly administer oxygen did not cause Dr. Hanson's death. Even if the flight crew did commit an error, the Court cannot conclude that this error provided a link in the causal chain that resulted in Dr. Hanson's death. *See Saks*, 470 U.S. at 406, 105 S.Ct. 1338. In reaching this conclusion, the Court is cognizant of the testimony of Dr. Zarir G. Marawala, who explained that a nasal canula is typically less effective than a mask when a patient is experiencing respiratory distress. According to Dr. Marawala, a person in such a condition is more likely to attempt to breathe through his mouth.

While this may be true as a general proposition, the Court finds that the use of a mask would not have been useful in this case. By the time Ms. Husain and the Olympic crew attempted to administer oxygen to Dr. Hanson, his condition had progressed beyond salvation. According to the testimony of Dr. Wasserman, the administration of oxygen by way of a mask or a nasal canula is generally useless when a patient is experiencing airway obstruction. After reviewing the entire record, Dr. Wasserman concluded that any error in the administration of oxygen and CPR to Dr. Hanson did not cause his death. Rather, by the time Dr. Hanson was seated in row 19, properly-administered oxygen, even through a mask, would not have prevented Dr. Hanson's death. Dr. Golden's testimony also supports this conclusion. According to Dr. Golden, when a patient's airways are constricted, an oxygen mask is no more effective than a nasal canula.

On the basis of this testimony, the Court concludes that, even if the flight crew's delay in providing oxygen

to Dr. Hanson constituted an "accident" under the terms of the Convention, that "accident" did not cause Dr. Hanson's death.

C. Failure to Ignite "No Smoking" Sign

Plaintiffs also argue that a separate "accident" occurred when the flight crew failed to request that the smoking passengers extinguish their cigarettes. Plaintiffs argue that the captain should have ignited the sign to ensure that no passengers would smoke in the vicinity of Dr. Hanson during his attack. According to plaintiffs, the failure of the captain and the flight crew to request that other passengers stop smoking while Dr. Hanson received oxygen constituted an "unusual" or "unexpected" event.

The Court rejects this argument for three reasons. First, according to the testimony of Olympic Airways captain Demetrios Karayannis, it is not standard procedure to ignite the "no smoking" whenever a passenger is experiencing medical problems. Viewed in light of this testimony regarding the standard of care, the Court cannot credit plaintiffs' argument.

Second, the Court finds nothing in the record to suggest that any passengers were smoking in the vicinity of Dr. Hanson while he received oxygen. Indeed, the smoking section of the airplane began in row 51, but, by the time the crew was aware of Dr. Hanson's distress, he was seated 31 rows away in row 19. Therefore, the flight crew's failure to turn on the "no smoking" sign did not constitute an unexpected or unusual event.

Finally, as discussed above, by the time the administration of Dr. Hanson's oxygen began, his condition had already become irreversibly fatal. Whatever minimal level of ambient smoke may have reached row 19 during

the incident, it certainly had no effect on Dr. Hanson's treatment, and did not cause his death.

IV. Willful Misconduct

As discussed in section IIIA above, Ms. Leptourgou's failure to move Dr. Hanson to another seat was an "accident," creating liability under the Warsaw Convention. Carrier liability under the Convention is normally limited to $75,000 per passenger. However, that limitation on damages does not apply if the defendant airline committed willful misconduct in causing the accident. *See Koirala v. Thai Airways Int'l*, 126 F.3d 1205, 1209 (9th Cir.1997). Article 25, the Convention's "willful misconduct" provision, does not create a distinct cause of action separate from Article 17, the Convention's "accident" provision. *See McDowell*, 54 F.Supp.2d at 1320. Rather, Article 25 simply modifies the potential recovery of a passenger who has established the occurrence of both an "accident" and "willful misconduct." *Id.* In other words, if no "accident" occurred on the flight, the Court cannot find that defendant is separately liable for the "willful misconduct" of the crew. In this case, because the Court has concluded that an "accident" caused Dr. Hanson's death, the Court must next determine whether the behavior of the flight crew constituted "willful misconduct."

The Ninth Circuit has defined "willful misconduct" as "the intentional performance of an act with knowledge that the . . . act will probably result in injury or damage or the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences." *Koirala*, 126 F.3d at 1209. *See also Hermano*, 1999 WL 1269187 at *5 (citing *Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1290 (11th Cir.1999)) (to establish willful misconduct, plain-

tiff must show that defendant acted with "intent to cause damage" or " 'recklessly and with knowledge' that damage would probably result."). In a case published earlier this year, the Fourth Circuit considered whether "willful misconduct" requires subjective or objective recklessness. *See Bayer Corp. v. British Airways*, PLC, 210 F.3d 236 (4th Cir.2000). The court concluded that the former standard was more appropriate, noting that "[o]n a mens rea spectrum from negligence to intent, article 25's standard is very close to the intent end." *Id.* at 238. Rather than establishing that the actor "should have known" of an obvious risk, the plaintiff in a case brought under the Warsaw Convention must, at a minimum, prove that the actor "must have known" of the risk in order to establish willful misconduct. *Id.* at 239 (quoting *Piamba*, 177 F.3d at 1291). The plaintiff bears a "heavy burden" in proving willful misconduct. *Id.; see also Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 668 (D.C.Cir.1996) (requiring plaintiff to show actor's subjective state of mind in order to prove "willful misconduct"); *Piamba Cortes*, 177 F.3d at 1291. Although the Ninth Circuit has not explicitly decided whether Article 25 requires an element of subjective knowledge, the *Koirala* court held that "conscious and reckless disregard" of the crew's duties constituted willful misconduct under the Convention. *Koirala*, 126 F.3d at 1212. For the purposes of this decision, the Court will assume that the Article 25 requires a finding of subjective recklessness.

The Court must note, however, that Ms. Leptourgou's subjective state of mind "may be established solely by inferences taken from circumstantial evidence; the inferences thus act as 'a legitimate substitution for intent to do the proscribed act because, if shown, it is a proxy for that forbidden intent.' " *Piamba Cortes*, 177 F.3d at 1286 (quoting *Saba*, 78 F.3d at 668). In fact, it is possible to

infer subjective recklessness based on "the very fact that the risk was obvious." *Id.* at 1291 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)).

In this case, the Court finds that the flight attendant's failure to move Dr. Hanson or to report Ms. Husain's request to the CCA was "willful misconduct." The Court concludes that, at the time of her third refusal to assist Dr. Hanson, Ms. Leptourgou *must have known* that the cabin was not full, that Dr. Hanson had a medical problem and a special susceptibility to smoke, and that her failure to move him would aggravate his condition and cause him probable injury. The Court reaches this conclusion only after a careful examination of the testimony and the circumstances of Ms. Leptourgou's repeated refusals to help the Husains.

A number of considerations support the Court's conclusion. First, the Court finds that, at the time of the accident, Ms. Leptourgou was aware of the industry standard of care described in section II, *supra*. Mr. Fotiades testified at trial that the flight attendants working under his supervision were aware of the appropriate responses to seat transfer requests. Second, the Court finds that Ms. Leptourgou was aware of Olympic's specific policy requiring that a flight attendant inform the CCA when a passenger requests a seat transfer for medical reasons. Ms. Xourgia testified that Olympic flight attendants receive formal training on this policy. Third, the Court finds that Ms. Leptourgou must have known that Flight 417 was not "totally full," as she informed Ms. Husain. The evidence shows that Ms. Leptourgou passed through the cabin prior to takeoff to ensure that all passengers were seated. During this walk-through, Ms. Leptourgou must have seen several empty seats. In the face of this inference, defendant has submitted no

evidence whatsoever to suggest that Ms. Leptourgou did not know or might not have known that the plane contained empty seats.

From this understanding, the Court next turns to the crucial testimony of Ms. Husain. Because Ms. Leptourgou was not available to testify in this trial, Ms. Husain's memory of her conversations with the flight attendant are entirely uncontested. The Court finds Ms. Husain's testimony on this topic highly credible.

The testimony of Ms. Husain makes one thing clear: Ms. Husain was not merely a typical passenger complaining about an inconvenient seat assignment. Ms. Husain made three requests to be moved. Nothing in the record indicates that any other passenger requested any such assistance more than once. Additionally, each of Ms. Husain's requests was more emphatic and desperate than the last. Once the passengers seated behind Dr. Hanson had begun to smoke, Ms. Husain's pleas reached a level of unmistakable urgency and seriousness. According to her testimony, Ms. Husain literally *begged* Ms. Leptourgou to move her husband. She told the flight attendant, "I don't care if the plane is full. Sit him on the carpet, sit him in first class, but don't sit him here." The Court finds that Ms. Husain communicated her husband's problem to the flight attendant so emphatically that Ms. Leptourgou must have recognized the danger. Further, Ms. Husain indicated to Ms. Leptourgou several times that she wanted only her husband moved, not the rest of the family. The fact that Ms. Husain was willing to sit apart from her husband during the entire ten-hour flight should have indicated to the flight attendant that the situation was serious enough to merit further consideration. After hearing the testimony of Ms. Husain, the Court concludes that Ms. Leptourgou cannot have failed to recognize that Dr. Hanson's problem was a

medical one and that sitting near the smoking section was likely to cause him injury.

Moreover, the evidence suggests that Ms. Leptourgou *did* in fact recognize the seriousness of Ms. Husain's request, even though she failed to respond appropriately. The fact that Ms. Leptourgou gave Ms. Husain permission to act on her own to find another seat indicates that she understood the seriousness of Ms. Husain's entreaties. Clearly, Ms. Leptourgou understood that Dr. Hanson's problem was serious enough to merit a seat transfer of some type. Her subsequent failure to assist Ms. Husain or to follow standard procedures by contacting the CCA is inexplicable. The Court can only conclude that by refusing to perform her duties, Ms. Leptourgou deliberately closed her eyes to the probable consequences of her acts. This was willful misconduct.

Defendant has suggested that, because Ms. Leptourgou could not have known that Dr. Hanson would die as a result of his allergy, she could not have recognized the risks inherent in her actions. While the Court agrees that Ms. Leptourgou did not know that Dr. Hanson would die if not moved, this fact alone does not preclude a finding of willful misconduct. Plaintiffs must show only that Ms. Leptourgou was aware that her refusal to assist Dr. Husain was likely to cause an injury to him; they need not establish that Ms. Leptourgou was aware of the exact injury that her act was likely to cause. *See Saba*, 78 F.3d at 668. In other words, Ms. Leptourgou need not have known, and in all likelihood did not know, that Dr. Hanson might die as a result of her refusal to assist him. However, for the reasons discussed above, she did know—she *must have known*—that her acts in violation of recognized policy were likely to cause him injury.

Defendant has also suggested that Ms. Husain should have been even more explicit than she was in making her

pleas to Ms. Leptourgou. No doubt she could have used precise medical terms rather than stating that her husband was "allergic" to smoke. Arguably, she could have explained that her husband had suffered two serious medical incidents in the previous year that required the assistance of the paramedics. Perhaps these more explicit explanations would have propelled the flight attendant to take the appropriate action. However, the Court rejects this argument for two reasons. First, as explained above, Ms. Husain's pleas, while factually bare, were sufficiently straightforward to alert Ms. Leptourgou of the impending danger and the need to move Dr. Hanson to another seat. Ms. Husain's use of the term "allergic to smoke" notified Ms. Leptourgou that Dr. Hanson's problems were medical in nature, even though her words may have been medically imprecise. Further, the emotional urgency of Ms. Husain's requests, which was conveyed in her testimony before this Court, informed Ms. Leptourgou of the potential seriousness of Dr. Hanson's medical problems. Although Ms. Husain did not use the word "asthma" or describe the incident in Las Vegas, Ms. Leptourgou must have known the gravity of Dr. Hanson's condition.

Second, the Court declines to place the unreasonable burden on airplane passengers to provide a detailed explanation of their medical history in order to receive the mandatory and expected acceptable level of service. When aboard a commercial airplane, passengers can be anxious and inarticulate. Airline regulations, both written and unwritten, recognize that passengers are not always able to completely articulate their needs. For this very reason, airlines create policies and procedures, such as Olympic Airways' requirement that a flight attendant must inform the chief cabin attendant upon learning of a passenger's medical needs. At a minimum, compliance

with such procedures leads to a more accurate exchange of information between the passenger and the crew. Ms. Leptourgou knew that Dr. Hanson had a susceptibility to smoke, knew that his wife feared serious injuries if he remained in row 48, knew that the flight was not entirely full, and knew that Olympic regulations required her to contact the CCA and/or to make an effort to move Dr. Hanson. In spite of all this knowledge, she did nothing.

Ms. Fairechild, a 21-year veteran of commercial airline service, testified to the egregiousness of Ms. Leptourgou's behavior, noting that she was "shocked" by Ms. Leptourgou's failure to act and labeling it "criminal." After reviewing the record, Ms. Fairechild testified that "I've never seen anybody treated like this on an international flight, so it's not—it's not airline service as far as I experienced or I would expect." In light of all this evidence, the Court must conclude that Ms. Leptourgou's behavior constituted willful misconduct, as that term has been interpreted under the Warsaw Convention. *See Koirala*, 126 F.3d at 1211 (finding inference of willful misconduct based on expert testimony that "the flight crew's actions in this case were 'completely substandard of any scheduled airlines in the world.' ").

V. Comparative Negligence

The Court must next turn to the difficult question of comparative negligence. While the Warsaw Convention creates a strict liability standard for injuries caused by accidents during international travel, that liability is not absolute. Article 21 of the Convention provides:

> If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Both parties agree that the Court should apply California's comparative negligence standard in this case rather than a traditional contributory negligence standard. *Accord Eichler v. Lufthansa German Airlines*, 794 F.Supp. 127, 130 (S.D.N.Y.1992) (applying federal common law comparative negligence standard); *Bradfield v. Transworld Airlines, Inc.*, 88 Cal.App.3d 681, 685, 152 Cal.Rptr. 172 (1979) (applying state law comparative negligence standard).

A recent unpublished district court opinion from New York perhaps best describes the Convention's rule regarding comparative negligence. *See Eichler v. Lufthansa German Airlines*, 1994 WL 30464 (S.D.N.Y. Jan. 28, 1994). The *Eichler* court noted the apparent incongruity of the Convention's no-fault standard of liability under Article 17 and its consideration of contributory negligence under Article 21. Analogizing to the arena of strict products liability, the court concluded that Article 21's standard is best described as a "comparative causation" standard rather than a "comparative fault" standard. In other words, although the predicate for triggering Article 21 is negligence, "the basis for apportioning liability is the *comparative responsibility or causation* of the parties." *Id.* at *5 (emphasis added). The Court adopts this well-reasoned interpretation of the Convention.

Accordingly, the Court must consider two questions. First, the Court must determine whether Dr. Hanson acted negligently during Flight 417. If the Court answers that question in the affirmative, it must next consider the comparative causation of Ms. Leptourgou's refusal to assist Dr. Hanson and Dr. Hanson's own negligent failure to act.

A. Dr. Hanson's Negligence

Defendant suggests that Dr. Hanson was negligent in two ways. First, defendant contends that Dr. Hanson's failure to request to speak with Ms. Leptourgou's supervisor was unreasonable. Second, defendant asserts that Dr. Hanson's failure to make any attempt to find another passenger who was willing to switch seats with him was also negligent. The Court will address these two arguments in turn.

1. Failure to Seek Assistance of Supervisor

First, defendant suggests that Dr. Hanson and Ms. Husain should not have merely accepted Ms. Leptourgou's refusal to move Dr. Hanson. Rather, they should have requested to speak with Ms. Leptourgou's supervisor. The Court disagrees. Imposing such a duty would place an unreasonable burden on a passenger, penalizing her for obeying the instructions of a flight attendant. Moreover, it is not realistic to expect Ms. Husain to understand the flight crew hierarchy aboard commercial aircraft. Indeed, as Ms. Husain testified at trial, she did not know at the time of the incident that Ms. Leptourgou even had a supervisor. A reasonable passenger in Ms. Husain's position would have reached precisely the conclusion that Ms. Husain herself reached after listening to the flight attendant's final rebuff: her husband could either remain in his assigned seat or take it upon himself to exchange seats with another passenger. The Court cannot fault either Dr. Hanson or Ms. Husain for failing to realize that the aircraft also carried a CCA to supervise the flight attendants.

2. Failure to Attempt to Move Independently

Defendant's second argument is far more persuasive. The Court finds that Dr. Hanson was negligent in failing to attempt to transfer his seat after Ms. Husain's third interaction with Ms. Leptourgou. As described above, after Ms. Husain's third request to move her husband, the flight attendant responded that the plane was full and that she could not move Dr. Hanson. She then told Ms. Husain, "You have to go ask people yourself."

Without question, Ms. Leptourgou's instruction to Ms. Husain was inappropriate in light of Olympic's policies. However, once the flight attendant granted Dr. Hanson and Ms. Husain permission to find a seat on their own, that option was available to them. Dr. Hanson, after apparently weighing the potential risk to himself against the inconvenience, discomfort and probability of success of personally requesting a seat transfer from other passengers, chose not to act. The Court finds that this decision was unreasonable under the circumstances.

Dr. Hanson was in a unique position to understand precisely how serious his condition was. He knew his medical history. He was aware of his near-fatal attack in Las Vegas and his breathing troubles in Alameda. As a doctor, he probably understood his condition and the risks associated with it. He alone knew exactly how the ambient smoke was affecting his body during the hours leading up to his death. In other words, like Ms. Leptourgou, Dr. Hanson must have known that he would probably be injured if he remained in row 48. Ms. Leptourgou presented him with an option to escape the potential injury that inhaling the smoke-filled air would cause: he could walk toward the front of the cabin and approach other passengers to ask them to switch seats with him. In light of what Dr. Hanson knew and what he should have known, the Court concludes that he should

have accepted Ms. Leptourgou's option, as unappealing as it may have appeared. The failure to do so constituted negligence.

B. Comparative Causation

While Dr. Hanson's failure to act was negligent, that negligence does not necessarily eradicate the effects of Ms. Leptourgou's wrongdoing. Dr. Hanson does not bear the full responsibility for the events that transpired after the meal service. *Either* Dr. Hanson *or* Ms. Leptourgou could have taken action to move Dr. Hanson to the front of the plane. Both should have taken such action. Neither can point to the other as being solely responsible for Dr. Hanson's death. The Court must therefore determine how each actor's wrongful or negligent decisions contributed to the tragedy that followed.

At first glance, it may appear that Dr. Hanson's failure to act played the larger role in causing his death. As discussed above, he had intimate knowledge of both the extent of his sensitivity to smoke and the effect of the ambient smoke on his ability to function during the flight. Further, it was Dr. Hanson who made the ultimate decision not to attempt to move. Viewing the facts from this perspective, whatever Ms. Leptourgou's culpability, Dr. Hanson should bear the greater responsibility for causing his own death.

After careful consideration of the evidence, the Court concludes that this "first glance" position is incorrect for two reasons. First, while Dr. Hanson should have attempted to switch seats with another passenger, there is no guarantee at all that his actions would have resulted in his finding a new seat farther from the smoking section. Nothing in the record indicates that other passengers would have been willing (or are typically willing) to switch seats at the request of a fellow passenger with an

assigned seat in close proximity to the airplane's smoking section. Further, it is far from clear that Dr. Hanson would have discovered the availability of the eleven unoccupied seats during his proposed sojourn to the front of the cabin. The evidence before the Court establishes that, to the average observer, the plane appeared to be full. The open seats were likely scattered throughout the cabin, and were difficult to see with an unfamiliar eye. Dr. Hanson may not have discovered an empty seat or found another passenger willing to swap seats.

On the other hand, if Ms. Leptourgou had acted properly, it is highly unlikely that Dr. Hanson would have remained in row 48. It is far more likely that, had Ms. Leptourgou followed the appropriate procedures, the CCA would have been able to move Dr. Hanson into one of the empty non-smoking seats. Further, the CCA also had unique knowledge as to which passengers were "non-revenue" passengers who could be easily asked to move. Therefore, in terms of likely outcomes, Ms. Leptourgou's failure to act was of greater consequence than Dr. Hanson's.

Second, although Ms. Leptourgou gave Dr. Hanson and Ms. Husain her permission to search for another seat, the fact remains that the flight attendant was in a far better position to effectuate a change. Ms. Leptourgou had knowledge of the flight crew hierarchy and had access to the CCA and his additional knowledge and influence. She also had the ability to find Dr. Hanson an open seat without any significant effort. Further, as a trained flight attendant, she had both experience and expertise in making requests such as the one she suggested that Ms. Husain make on her own. None of this can be said for Dr. Hanson himself. In other words, Ms. Leptourgou, had she merely responded to Ms. Husain's pleas in an appropriate manner, could have

achieved a seat transfer with far less effort than Dr. Hanson acting alone.

When a passenger enters a commercial flight, he surrenders a certain level of freedom—freedom of movement, of expression and of choice—in return for a promise of safety and comfort. Passengers agree to abide by a set of rules; they are expected to behave in a certain way in order to avoid communal danger. As an element of this unwritten compact, passengers bestow upon the airline and the flight crew nearly absolute authority to control and manipulate the mobile environment for the benefit of all those aboard. Courts have recognized this authority in both civil and criminal contexts. *See, e.g.*, 49 U.S.C. § 44902; 14 C.F.R. § 91.11. Passengers grant a certain level of power to the airlines, but with that power comes responsibility. The flight crew has the unique ability to provide comfort and safety during air travel, which passengers have the right to expect. *See McDowell*, 54 F.Supp.2d at 1319 ("It is recognized in most jurisdictions that airlines owe a heightened duty of care to their passengers."); *Williams v. Trans World Airlines*, 509 F.2d 942, 946 n. 8 (2d Cir.1975) ("It has generally been held . . . that commercial air lines . . . owe their passengers the duty of utmost care for their safety.").

In this case, as a result of his position as an airline passenger, Dr. Hanson's ability to make decisions about his fate and to act on those decisions was diminished. By entering the controlled environment of the airplane, Dr. Hanson had authorized the flight crew to act on his behalf to protect his safety. In return, he implicitly agreed to obey the commands of the flight crew—to remain in his assigned seat until permitted to move, to sit when told to do so, and not to disrupt the cabin environment. Therefore, while Dr. Hanson himself may have

been in the best position to recognize the danger that row 48 presented to him, he was in the worst position to actually do something about it.

For these reasons, the Court cannot find that Dr. Hanson's negligence played a more significant causal role in his death than did Ms. Leptourgou's wrongdoing. By the same token, because of Dr. Hanson's unique knowledge of the danger, the Court cannot conclude that he played no role in causing his death. In the end, the Court concludes that the failures of both parties contributed equally to the tragedy that followed. Therefore, the Court finds that Dr. Hanson was comparatively liable for his death at a rate of 50%.

VI. Damages

Having determined that defendant is liable under the Warsaw Convention, that defendant's liability is not limited to $75,000, and that defendant was contributorily negligent in causing his own death, the Court must next determine the total amount of damages suffered by plaintiffs as a result of Olympic's misconduct. The evidence before the Court supports an award of damages commensurate with the pecuniary loss to Dr. Hanson's surviving family. The parties have not established in their briefs or their arguments to the Court that damages in excess of that amount are legally appropriate in this case.

To determine the amount of pecuniary damages, the Court received a report and heard testimony from C. Daniel Vencill, Ph.D., who examined Dr. Hanson's financial health for the purposes of determining damages in this case. Dr. Vencill's testimony was uncontradicted, and his conclusions went largely unchallenged by defendant. Defendant's post-trial brief and argument do not attack the validity of Dr. Vencill's methodology or his calculations.

Dr. Hanson's earning history shows an average taxable income of $140,052.12 over the six-year period prior to his death. He intended to work until at least age 65 in order to provide for his family and finance his children's college education. Based on Dr. Vencill's uncontroverted testimony, assuming a 5.5% discount rate and a 2% growth rate, and deducting at a rate of 31% for personal consumption, the Court concludes that the total amount of pecuniary loss to plaintiffs as a result of Dr. Hanson's death was $1,400,000.00.[12]

This finding is supported by Dr. Vencill's calculations, as presented in his written and oral testimony to the Court. In reaching this conclusion, the Court is guided by Dr. Vencill's testimony that the most accurate calculation of Dr. Hanson's income is reached by modifying Dr. Hanson's taxable income to account for cash flow. Additionally, the Court finds Dr. Vencill's calculations based on Dr. Hanson's six-year earnings more reliable than the calculations based on Dr. Hanson's 1997 earnings alone. Finally, although Dr. Vencill posited at trial that a higher figure of approximately $1.5 to $1.6 million was appropriate, the Court accepts the $1.4 million figure because it more accurately reflects the total amount of non-market work performed by Dr. Hanson in his home prior to his death.

As noted above, the Court finds that Dr. Hanson was comparatively negligent at a rate of 50% in causing his death. Therefore, plaintiffs may recover only 50% of their $1,400,000.00 in economic losses. The Court awards plaintiffs $700,000.00 in total damages.

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[12] Although Dr. Hanson's medical practice sold for $200,000 after his death, the Court will not use this figure to mitigate the total damage to the surviving family members. The practice would have elicited a similar price upon Dr. Hanson's retirement even if he had not died in 1998.

CONCLUSION

For the foregoing reasons, the Court hereby finds that an accident occurred aboard Olympic Airways Flight 417 on January 4, 1998, and that the accident caused the death of Dr. Abid Hanson. The Court further finds that Olympic Airways committed willful misconduct in failing to react to Ms. Rubina Husain's requests for a seat transfer for her husband. Finally, the Court finds that Dr. Hanson himself was contributorily negligent in causing his death, and that his negligence contributed to his death at a rate of 50%. Accordingly, the Court hereby awards plaintiffs $700,000.00 in damages.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE CHARLES R. BREYER, JUDGE

No. C 99-1400 CRB
May 30, 2000

RUBINA HUSAIN, ET AL.,

Plaintiffs,

—VS.—

OLYMPIC AIRWAYS,

Defendant.

TRANSCRIPT OF BENCH TRIAL
VOLUME 1

Husain, R. - Direct \ Sterns

[112] leg or for both Cairo—
A. Two sets.
Q. —on to JFK?
A. On to JFK.
Q. And they were boarding passes for the whole family.
A. Yes.

Q. And you took them from your husband, you went back up to the check-in agent?

A. Yes.

Q. Why did you do that?

A. Just to make sure that we were in a non-smoking section.

Q. And what did you say to the gate agent and what did he say to you?

A. I said to him—I showed him the letter. I remember—I don't know if you have in your records, I had given you, my brother-in-law had given me, that says he has the history of asthma. So I showed him the letter. I said, "Make sure you give him non-smoking seats."

He says, "Yeah, yeah, I'm sure."

I said, "All the way from here to Cairo—from Cairo to Athens and Athens to New York."

He said, "Don't worry, ma'am, it's taken care of."

I said, "Are you sure?"

He says, "I'm sure."

Q. Okay.

[113] A. So that was it.

Q. That was all you said.

A. Uh-hum.

Q. Did you have this little kit with you at this time, or not?

A. Yes, we always had that.

Q. Okay. And when you looked at your tickets or your boarding passes that he had been giving you, did it say smoking or non-smoking on that?

A. I don't remember what it—if it said, no.

Q. All right, and then you went, then, onto the plane at Cairo?

A. From Cairo, yes.

Q. Was that delayed at all or on time?

A. I don't remember if it was.

Q. Was the Cairo-Athens all right, no problems on that?

A. Yeah, no problems.

Q. You got to Athens and to the airport.

A. Yes.

Q. And you remember that you were placed into a terminal holding area, sort of a transit lounge, I guess, is the word.

A. It was—everybody—it was a vacation time. Everybody was flying back, and I remember almost—there was no place to sit on the seat. We were all sitting on the floor. It was so crowded. It was after Christmas, and they had every flight * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE CHARLES R. BREYER, JUDGE

No. C 99-1400 CRB
May 31, 2000

RUBINA HUSAIN, ET AL.,

Plaintiffs,

—VS.—

OLYMPIC AIRWAYS,

Defendant.

TRANSCRIPT OF BENCH TRIAL
VOLUME 2

Husain, R. - Cross\Fearon

[294] Q. And you made the bookings for your family, and as I understand it, Mrs. Sabharwal made the bookings for her family, correct?

A. Her husband did.

Q. I'm sorry?

A. Dr. Sabharwal did.

Q. You were not involved in making any reservations for the Sabharwal family?

A. We kind of did it together, so. . . .

Q. Did you use the same travel agency in New York, if you remember?

A. Yes.

Q. All right, and at the time you made the bookings with the travel agency, did you request any special handling for your husband or any member of your family?

A. No, I did not.

Q. So there was no request for special meals or special seats or wheelchair assistance or anything like that, is that correct?

A. That's right.

Q. And at the time you made the bookings, did you advise the travel agency or United Airlines or Olympic Airlines that you would be carrying oxygen on board the aircraft?

A. No, I did not.

Q. Was this trip which you took to Athens and Cairo the first * * *

Fairechild - Direct \ Sterns

[455] (Whereupon, Plaintiffs' Exhibit 69 was received in evidence.)

Q. (BY MR. STERNS): Is this a standard diagram from the Boeing manual that shows how it circulates?

A. It looks to me, if I'm looking at this correctly, the air comes from the top, and then it's got a circulation pattern, then goes out.

Q. Am I looking at this correctly? That the closer you are toward the center, that is to say, the further away you are from the window, the less likely you're to get circulated air?

A. That's right, the fresh air you get in the center section. That's correct.

Q. And if one were to pick the worst possible spot, from the point of view of air, if you've got smoke, outside of the exact smoking section itself, it would be in E section, in one of the middle seats?

A. That's right, that's the worst possible air.

Q. Okay. I want to talk to you, if I may, about what you have indicated in your report at being the special information log, and I want to hand you what's been now marked at Exhibit 71, which is the exhibit from Mr. Youseff's deposition, Exhibit B. Mr. Youseff is the gate check-in, or—not gate, strike "gate"—the check-in person at Cairo whose deposition was taken. Is this an example of that special information log, SIL?

[456] A. That's right.

Q. And what sort of information turns up on that, by way of illustration?

A. Special meal and special medical conditions; also anything unusual. For instance, here's one, a seven-year-old, probably unaccompanied minor, or we would get somebody who doesn't speak any of the languages that the crew spoke, things like that.

Q. That's a standard form you see through the industry?

A. Yes.

Q. Tell us how that works. Now, how does information get into that? How does it get distributed? Who should see it?

A. Special information log is started when the passenger makes their reservation, and if they mention to the reservation agent that there's something special or unusual about their needs, it would go in at that time and come up every time they get to the check-in agent.

Again, the check-in agent is looking at the passenger, talking to the passenger, so he's adding to the special information log, as he's also checking the bags, noting the weight of the bags, how many bags, and so it's accumulated, until finally, at the very last minute before the door shuts, it's handed to the in-flight purser.

Q. The purser being the same as the chief cabin attendant?

A. Chief cabin attendant, or in-flight purser, or chief **[457]** purser.

Q. So it's a cumulative thing that different people add to, correct?

A. Yes.

Q. And the purpose of it is to, what, alert the chief cabin attendant to any special situation, requests, that kind of thing?

A. Exactly.

Q. You mentioned examples. Wheelchair would be something in there?

A. I forgot to mention wheelchair, but yes, wheelchair would be on there, unaccompanied minors, language problems, medical problems.

Q. Special meals?

A. Yeah, and special meals.

Q. All right, now, let's hypothetically now, if someone were to make a request, saying that "I have a husband who has an allergy or is very sensitive to tobacco smoke and cannot be around it, medically he cannot do that, I have a little kit that I carry in case, and I have a little thing from the doctor says he can't do that," that information, is that the sort of thing that gets inputted, or should be, into that sort of document?

A. That's the kind of thing we're used to seeing on the special information log, yes.

[458] Q. Okay, and is that hooked in by computer so it could be done at different places?

A. Yes.

Q. Now, in this case, what have you learned about whether there was anything inputted or not for Dr. Hanson?

A. I was looking for it, and it looked like it was never inputted into the special information log.

Q. Okay. Now, I want you to assume for a moment that a request similar to what I just outlined to you was specifically made at the Cairo check-in. Should that have gone into the SIL?

A. Yes, it should have gone in the SIL in Cairo.

Q. And that would ultimately end up in the hands of the chief cabin attendant, right?

A. Yes.

Q. All right. That chief cabin attendant was Mr. Fotiades. You read his deposition?

A. Yes, I did.

Q. And you recall in there, and I'll ask you to assume for moment that he did so testify, that he never heard of any request for special seating, or problem with Dr. Hanson until after he died?

A. Yes, that's—I believe that's true.

Q. Would that be contrary to what you understand to be the standard of the industry for the SIL and the information [459] therein?

A. Yes, that's not the standard of care for the industry.

Q. All right. Now, you also, did you read the deposition of the widow?

A. Yes.

Q. An her multiple requests of the flight attendant to be—to have her husband moved.

A. That's right.

Q. And so there's no confusion, I want you to assume that that request was not for the whole family of five, which I realize would have been a different situation, but just for the one, the doctor, okay?

Now, first preliminary question. As a chief cabin attendant or purser with 21 years of experience, on an international flight with smokers, have you run into situations where you've had to change seats for people?

A. Very often.

Q. All right, and what was the procedure? How do you go about doing that?

A. You know, Jerry, something in my mind. I wonder if I could just say it and backtrack for a second. Would that be all right?

Q. Sure.

A. The special information log is compiled and handed to the purser or the chief cabin attendant at the very last second, [460] like I said, but before the flight there's a thing called a crew briefing, and they bring the special information log, as complete as it is at that moment, into the crew briefing, and the purser goes over the special needs, and so he would say at that time to the cabin attendant working E section, you know, that you're going to have an unaccompanied minor, or wheelchair, and somebody allergic to smoke. So the person would actually be waiting for these special needs prior to takeoff.

Q. That's what should be done.

A. That's the way it is on the airlines that I worked for.

Q. But no indication that it was done here?

A. No indication here.

Q. So we know from Mr. Fotiades' testimony, he didn't know anything about this.

A. Right, so either they didn't bring the log in or it wasn't inputted for some reason.

Q. This the first phase. Now, the second phase, I want you to assume that there's been these requests made to the cabin attendant and then come back to you. How would that be handled in a standard situation?

A. That Mrs. Husain asked on the ground?

Q. Right.

A. I was shocked the way it was handled with Olympic Airways, because any flight attendant in the airlines that I worked **[461]** with would immediately have taken some action.

One, you could go up to the purser and say there's a problem here, there's somebody who says they're allergic to tobacco smoke.

Two, if the purser was busy handling something else, you would go right away to the ground agent, because they know which seats are booked and which seats are still empty, before everyone is on board.

And three, you could always go to the captain at that time, if there was nobody else around, but some action needed—would need to be taken.

Q. And this was—this obligation would fall on the flight attendant?

A. On the flight attendant who heard it, yeah, immediately.

Q. She's got, then, three lines of communication up, to the CCA, to the gate, or to the captain.

A. Right.

Q. Any indication in this case that any of that was done?

A. That was not done in this case.

Q. I want you to assume that the captain doesn't know anything about anything until he's told he's got a dying, or a passenger in distress on his airplane.

A. Right.

Q. And at that point, the situation has reached where he is considering diverting to London. It's gotten that bad. Okay? **[462]** Now, moving, let's talk about moving people.

Let's first assume that there are maybe 14 seats still open in this airplane somewhere. What would have been the duty of the flight attendant, or the CCA there, with this kind of request?

A. To try and find a seat for him, either in the front of A-section or somewhere in C-section.

Q. Now, let's assume that it's absolutely full, as has been the testimony from a number of different people. As the chief purser, have you moved people and switched seats when you're dealing with a medical situation like this?

A. We do. We do move people. We never force people. So we try and find some incentive to get people out of their seat.

Q. How do you do that?

A. Well, for instance, the Husains had five seats, so one of them was a window seat. So somebody, for instance, in the center section of C, we could say, "Well, we have a window seat for you, would you . . . ?" You know, we try and find something that would make it an incentive, and then all the Husains could move over and then one seat could go up to A-section, something like that.

Q. Would the international standards you told us about, though, require that somebody try to do something like that?

A. Absolutely, you have to try, or you have to offer them another flight, where they have a seat that, you know, that **[463]** they feel that they can maintain their health.

Q. Okay. Would the cabin attendant have that responsibility or the chief cabin attendant or who?

A. The ground agent would make that decision, or the captain.

Q. I see. So just take a situation, say that the flight attendant does his or her job, and sees she's got a medical situation, somebody can't sit here, and doesn't find a seat; so goes to the CCA, who's got control over the whole deal, right?

A. Right.

Q. And they look around, and by Lord, there aren't any seats.

A. You do both at the same time, actually, start looking for another seat and you inform the chief purser.

Q. Say you can't get anybody to move.

A. Right, if you can't inspire somebody to change it, there's nowhere suitable to change him to, then the gate agent has to offer them a seat on a later flight.

Q. Come back, say, "Dr. Hanson, we understand you have a problem, you can't be around cigarette smoke. I'm sorry, you're just right in front of our smokers, we're going to offer you another flight."

A. Right.

Q. How about even getting him up into business class, even though they haven't paid for it? Has that ever occurred in your experience?

[464] A. That's very common for this kind of thing. There's no problem changing classes for this reason.

Q. There is none. I want to talk to you a little bit about the oxygen. You commented on that in item 6 of your declaration. Tell us about in-flight oxygen, please. Where is oxygen kept, how do you get to it, and differentiate, if you will, between the stuff that comes down in the little baggy things, you know, when you see the FHA announcement, and the emergency oxygen.

A. Emergency oxygen is kept in portable oxygen bottles, which are placed throughout the cabin. Generally there's two at every jump seat. So on the 747 there's ten—actually twelve, ten and one upstairs. So there's eleven jump seats, so there would be two bottles at each jump seat, so that would be what, 22, and then there were several others scattered in what we call bustle compartments behind the last row and seats here and there, and those bottles are to be used for emergency, just like this, or in case of a decompression, when the oxygen masks drop from the overhead compartments, then the flight attendants, if they felt strong enough, would wear one of the portable bottles with the mask and go ahead and assist people.

Q. And those bottles then have oxygen that's under pressure, can come out at some flow rate that's acceptable?

A. Exactly.

* * *

[478] later, had Fotiades, according to an accepted international standard of care, notified the captain, "I got a breathing problem down here," one, and two, the captain then turns off that smoking sign—you with me, okay?

And assuming the passengers stop smoking, and here again, it would be incumbent on the flight attendants to enforce that, would it not? Is that correct, that would be parts of their job?

A. That's correct.

Q. Let's assume they stop smoking in a reasonable time. This fifty-fifty recirculation is going to get better in not too long a time, will it?

A. That's true.

Q. And you've had that situation, too?

A. The plane seems to clear out of smoke, you know, very quickly, three or four minutes.

Q. Okay. I want to ask you one other question. In the totality, then, of what happened here, in terms of the failure of the input into the computer system for Mr. Hanson's problem, the failure to offer him another flight, the failure to have a briefing about this problem, the triple failure of the flight attendant to do anything about the request, even to pass it up through the chain of command, the failure to respond with the oxygen—I want you to assume that their oxygen didn't works or wasn't used, no mask, just a cannula, **[479]** the family had to use its own stuff—the failure to deal with the pressure, the failure to deal with the no smoking sign, the failure to move Dr. Hanson sooner, all of that. That conform to a recognized standard of care?

A. No, it did not.

Q. And did this, in your judgment, just amount to carelessness or forgetfulness on the part of the crew, or a deliberate blowing off of their duties?

MR. FEARON: Objection.

Q. (BY MR. STERNS): I'll rephrase—to a deliberate performance of an act that did not conform with their duties?

A. I don't know. I just think—I've never seen anybody treated like this on an international flight, so it's not—it's not—it's not airline service as far as I experienced, or I would expect.

Q. Let me come at it a little different way. Do you see anything in the record that suggests any reason, any explanation, other than disregard of the passenger, why, say, the flight attendant did not respond? Is there any explanation, they're too busy, they didn't understand, a language barrier, anything of any kind?

A. It seemed like they were too busy and too preoccupied.

Q. But in your professional opinion, they should have responded to these requests.

A. They should have absolutely responded.

* * *

[482] And one thing I would have done different than that chief purser is I wouldn't have kept running up to the cockpit. I would have just called. I would have stayed in the area and watched was what happening, until I felt that the best care that we could give was being given. You know, I would have made sure.

I mean, there are no drugs available, generally, in the first aid kit on the plane, so unless the doctor has something, you know, so there wouldn't be anything along that line that you could do. On the other hand, you are more familiar with the airplane environment than any doctor who's just there that day.

So it's a collaborative kind of thing, you both offer and see what you can do, and you keep the captain informed, in case it's really important for him to make an unscheduled landing.

THE COURT: How do you deal with a situation—it's now no longer a problem with all non-smoking flights, but there was a period of time where flights were both smoking—were smoking flights, and yet people would complain about the smoke, and tell you, or tell a flight attendant, "Look, I'm allergic." That's the word that was generally used, isn't that correct, "I'm allergic to cigarette smoke" or "Cigarette smoking bothers me"? When somebody says that, is it a problem that maybe you have too many people saying it on **[483]** a flight that

is basically a full flight, and you run into that type of problem?

THE WITNESS: We have had that kind of thing,

THE COURT: And what do you do in that?

THE WITNESS: Well, it's the purser's discretion and also the captain's discretion. Now, I personally am very sympathetic for this kind of thing because I don't like the smell of tobacco smoke myself, so I'm very, very sympathetic to everything that—to do everything that I could, including trying to contain it, you know.

There were years when they would allow smokers to stand around the galley while we were working, you know, so, again, every flight, it's really not a hard-and-fast thing, because all the players are different, all the people are different, and so ten people could say to you, "I'm allergic to smoke," but you kind of have to look at people, and you just, you can see, I mean.

I could tell just from reading Mrs. Husain's deposition how increasingly desperate she became in asking for the seat to be changed. And so again, it's in the moment. You just see, you feel and you see, and you use your training and your best intellect and you try and make a decision, but I mean, I would certainly go in favor of a person who's allergic to smoke than somebody's right to smoke, * * *

[493] A. Passengers never get a chance to talk to the pilot.

Q. Do you know whether they made such a request?

A. To the pilot?

Q. To speak with the pilot.

A. No. I doubt it.

MR. MAGGIO: That's it. Nothing further. Thank you.

MR. STERNS: Couple of follow-ups, if I may.

REDIRECT EXAMINATION BY MR. STERNS:

Q. (BY MR. STERNS): You made a comment in your direct testimony that—I think I have it quoted—"I've never seen a passenger treated like this," in answer on to one of my questions. I should have followed up with that. What did you mean by that?

A. Well, we were talking about when they were asking the—

Q. Re: change of seats?

A. Yes in the E-section, the change.

Q. Right.

A. I was saying that to ignore a passenger who has an increasingly strident request, practically verging on hysteria, just seems criminal.

Q. Can you find anything in the record that would justify or excuse the failure of the crew to respond to that request?

A. No, no excuse for that.

MR. STERNS: Thank you so much.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE CHARLES R. BREYER, JUDGE

No. C 99-1400 CRB
June 1, 2000

RUBINA HUSAIN, ET AL.,

Plaintiffs,

—VS.—

OLYMPIC AIRWAYS,

Defendant.

TRANSCRIPT OF BENCH TRIAL
VOLUME 3

Karayannis - Direct \ Fearon

[539] Q. During the course of that flight on that day, did any member of the crew or any passengers ever ask you to illuminate the "No Smoking" sign?

A. No, they never asked, and I don't think they have any
authority to ask that.

Q. All right. It's up to your judgment.

A. That's right.

Q. Well, did any event, any circumstance occur on that flight in connection with this Dr. Hanson, the man who died, to suggest to you that the "No Smoking" sign should be illuminated?

A. No, not at all.

Q. Let me ask you a few basic questions about the ventilation and air circulation system on the Boeing. Are you familiar with—

A. Yes.

Q. —how that operates?

A. Yes, I am.

Q. And what, basically, is the system on the Boeing 200 series for recirculation of air? How does it work?

A. Well, the airplane is—airplane cabin is like a balloon. It is inflated. The airplane altitude and the cabin altitude are two different things. We try to maintain—the manufacturers have designed the aircraft to maintain a cabin altitude as close to sea level, to normal environment, as **[540]** possible.

This is done by air which is drawn from the engines, bled from the engines, it is routed through the air conditioning packs, the air conditioning system. On most airplanes there are two air conditioning units. On the 747, because of its size, there are three. And this air is cooled in the air conditioning units. Because it's coming from the engines, It's very hot.

It is distributed into the cabin from overhead outlets, over the passenger service units. It is discharged at the bottom, near the floor of the cabin, routed through the cargo department, and discharged outboard through the outflow valves.

Now, this air is continuously drawn from the engines, routed through the cabin, discharged overboard, and there is a complete renewal of the cabin air, the whole volume, approximately every four minutes. There is no

recycle of that air on the Boeing 747. It is outside air, which is helped by recirculating fans, but don't let the name draw any conclusions. The recirculating fans only enhance the flow of air through the cabin, and as a proof of that, I have the checklist of the 747 in case of smoke removal, upper main deck smoke removal, where the actions we should do is oxygen mask regulators—smoke goggles on, cockpit door closed, crew communications established. This is for the captain of the **[541]** cockpit crew. Then, cabin signs on, cabin altitude selector increased, maximum cabin altitude 10,000 feet. Pressurization rate selector increase, bleed air valves switches open to get more air, duct isolation valve switches open. Pack valve switches open, gasper fan on, recirculating fan switches on.

Now, if there was contaminated air recycled through the cabin, we wouldn't be advised to use the recirculating fans to bring in contaminated air all the time. That proves that the air is outside air all the time, discharged overboard.

Q. And is that system, which you've just described to us, unique to the Boeing 747-200 series?

A. Well, I don't know if it is unique, but it applies to the 747-200 series, whereas to the aircraft that I fly now, the Airbus 340, the air is recycled, part of the cabin air is recycled into—through—some filters in air conditioning, and it is mixed with outside air, for economy, fuel observation purposes.

Q. So in the airbus which you are presently flying, if I understand you correctly, the air which is recycled in the cabin of the aircraft includes some component of air which had already been in the cabin.

A. That's right, except for the cockpit. The cockpit only uses outside air on the airbus. On the 747, the whole volume of air is outside air.

[542] Q. And there's no mixture with air that previously had been in the cabin of the aircraft?

A. Not at all.

Q. Are you sure of that?

A. According to my knowledge, yes.

Q. Okay, good. Captain, have you brought with you today a copy of your report of this incident in the Greek language?

A. That's right.

Q. All right. I wonder—do you have it in front of you? A. Yes.

Q. All right. If I asked you to interpret that into English as you—and then read it into the record, could you do that?

A. Yes, I can.

Q. All right, would you do that?

A. Okay.

"Approximately two hours and fifty minutes after takeoff at flight level 310, chief cabin attendant Mr. Fotiades entered the cockpit, escorted by a passenger by the name of Umesh Sabharwal, who told me that he was a doctor with medical permit California number A-34184, to announce the sudden death of another passenger and friend of his with whom he was traveling. The above named passenger—the above passenger, named Abid Hanson, had developed acute respiration problem. * * *

Xourgia - Cross \ Injijian

[733] Q. Well, let me ask you a specific question. Assuming that in this particular flight, as full as you remember it, you were a flight attendant working on in the smoking section of the coach class—

A. I have done that many times.

Q. —Good, and a passenger said to you that he suffered from some sort of allergic sensitivity to asthma, and could not be near cigarette smoke, and was bothered by cigarette smoke, and needed to be moved to a seat farther away from the cigarette smoke, and if it was, in fact, smoky, from your observations in that area, but the passenger was not showing any symptoms of being affected by this smoke yet, what would your responsibility be as a flight attendant under those circumstances?

A. Would that be on the ground or in the air, airborne? Q. Well, there's no smoking when the plane's on the ground.

A. But on the ground, the passengers know very well that this is their seat and how close it is to smoking, the smoking section.

Q. All right. What if the passenger made that request of you before there was any smoke in the area and the plane was still on the ground, everything else being the same?

A. And the aircraft was full?

Q. Pretty full. A few empty seats here and there, perhaps.

A. I would inform, immediately, I would inform the captain **[734]** and the chief cabin attendant about the situation, as it is a medical situation, it is a medical problem. I would not take the responsibility for anything, I would report it immediately.

Q. And would your failure to report to the chief cabin attendant and the captain under those circumstances be a violation of your duties as a flight attendant?

A. No, it wouldn't, because anybody could contact another crew member, could try themselves to speak to the chief cabin attendant, could walk forward and try to enter the cockpit. These are not sealed-off compartments in an airplane.

Q. So while you would feel it your responsibility to make the report, you wouldn't be violating any duty by failing to make a report. Is that your answer?

A. If it was for medical reasons, and the passenger told me that "I am truly sick and I need to speak to the chief cabin attendant," then it would be a violation of my duty. I don't think that a member of the crew would take that responsibility, would ever dare to take that responsibility.

Q. In other words, you would expect the passenger to insist on speaking with the chief cabin attendant, him or herself?

A. Yes.

Q. I see.

THE COURT: Well, let me see if I understand. If the person is on the ground, that is, the plane hasn't taken **[735]** off, and has explained to you that he's allergic, he has asthma, he's allergic to smoke, he does not want to be near smoke, would you try to move that passenger at that time, away from the smoke?

THE WITNESS: Yes, I would do so. I would look to move that passenger following the operational procedure that our company has.

THE COURT: Is that procedure written?

THE WITNESS: Yes, and it says that if a patient refers that he is sick, then we must report that immediately to the chief cabin attendant and to the captain, and that is what we are taught in our school.

THE COURT: So the failure to do so would be a violation of company policy.

THE WITNESS: If it has been requested from the passenger.

THE COURT: To move.

THE INTERPRETER: If a passenger had requested to move?

THE COURT: Yes.

THE INTERPRETER: And the crew had refused?

THE COURT: Yes.

THE WITNESS: I do not know what happens in such cases. I have never faced it.

THE COURT: Now, let us take the situation of where **[736]** the airplane is flying, and the meal service is complete, and a passenger tells you that they are bothered by the smoke, that they have asthma, and that they are allergic to smoke; and you observe that there's a lot of smoke in the area in which the passenger is seated. What is the procedure you would follow in that case?

THE WITNESS: I would transfer him immediately.

THE COURT: All right, thank you.

MS. INJIJIAN: I don't have anything else. Thank you very much.

THE COURT: Thank you very much. Do we have any more witnesses?

MR. FEARON: No, that's it.

MR. STERNS: Yes.

THE COURT: You may step down. Thank you very much for coming. Oh, while you are there, wait, this may . . . I want to ask this witness—would you resume the seat? You may not be able to answer, but you may be able to answer.

Are you familiar with a manifest—I'll show you—

Do we have Exhibit 12?

MS. INJIJIAN: Yes, your honor.

MR. STERNS: We do, your honor.

THE COURT: Is Exhibit 12 on that table? I'll hand you my copy, Exhibit 12. * * *

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12/22/97

Mr. Abid Hanson has history of recurrent anaphylactic reactions.

He has been advised to carry oxygen and epinephrine as a precaution.

/s/

02-1348

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IN THE

Supreme Court of the United States

OLYMPIC AIRWAYS,

Petitioner,

—v.—

RUBINA HUSAIN, ETC., *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER OLYMPIC AIRWAYS

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QUESTION PRESENTED

Whether the court below improperly held that the "accident" condition precedent to air carrier liability for a passenger's death under Article 17 of the Warsaw Convention can be satisfied when a passenger's pre-existing medical condition is aggravated by exposure to a normal condition in the aircraft cabin, even if the air carrier's negligent omission may have been in the chain of causation?

PARTIES TO THE PROCEEDING

The following persons and entities were parties before the United States Court of Appeals for the Ninth Circuit:

1. Petitioner OLYMPIC AIRWAYS.

2. Respondents Rubina Husain, Hannah Husain, Sarah Husain, Isaac Husain and the Estate of Abid M. Hanson, M.D.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner OLYMPIC AIRWAYS is a foreign corporation organized and existing under the laws of the Hellenic Republic of Greece with the majority of its shares owned by the government of Greece. No parent or publicly held company owns 10% or more of the stock of petitioner OLYMPIC AIRWAYS.

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Andreas F. Lowenfeld & Alan I. Mendelson, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967) ... 14n

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 316 F.3d 829 (9th Cir. Dec. 12, 2002) and is reproduced in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1a-21a.[1]

The initial Findings of Fact and Conclusions of Law of the district court are reported at 110 F. Supp. 2d 1234 (N.D. Cal. Aug. 28, 2000) and reproduced in the Joint Appendix ("J.A.") at JA8-JA56.[2] The Amended Findings of Fact and Conclusions of Law of the district court are reported at 116 F. Supp. 2d 1121 (N.D. Cal. Oct. 3, 2000) and reproduced at Pet. App. at 32a-80a.[3] The Supplemental Findings of Fact and Conclusions of Law of the district court are unofficially reported at 2000 WL 1780264, No. C 99-1400 CRB (N.D. Cal. Nov. 28, 2000) and reproduced at Pet. App. 23a-31a.

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 12, 2002. The Petition for Writ of Certiorari was filed within 90 days of that date and was granted by Order dated May 27, 2003. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

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[1] References preceded by "Pet. App." refer to pages in the Appendix to Petition for Writ of Certiorari.

[2] References preceded by "J.A." refer to pages in the Joint Appendix.

[3] The Amended Findings of Fact and Conclusions of Law only made technical corrections. All references herein are to the Amended Findings of Fact and Conclusions of Law.

TREATY INVOLVED

The applicable treaty is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No 876 (1934) *reprinted in* note following 49 U.S.C.A. § 40105 (1997) ("Warsaw Convention"). The complete text of the Warsaw Convention is set forth in the Appendix ("App.") hereto at 1a-20a.[4]

STATEMENT OF THE CASE

A. The Nature of the Case

Respondents Rubina Husain, individually and as personal representative of the estate of the decedent, Hannah Husain, Sarah Husain and Isaac Husain (hereinafter "plaintiffs") brought an action against petitioner OLYMPIC AIRWAYS (hereinafter "OLYMPIC") in the Superior Court for Alameda County, California to recover damages as a result of the death of Abid M. Hanson, M.D. (hereinafter the "decedent" or "Dr. Hanson") on January 4, 1998 while on board OLYMPIC flight 417 from Athens, Greece to New York. Pet. App. at 3a. Plaintiffs alleged that Dr. Hanson died as a result of an asthma attack caused by exposure to ambient cigarette smoke in the passenger cabin of OLYMPIC flight 417. Pet. App. at 3a.

OLYMPIC timely removed the action to the United States District Court for the Northern District of California on March 23, 1999 under 28 U.S.C. § 1441. Pet. App. at 33a; J.A. at JA1. The jurisdiction of the district court was based upon the Foreign Sovereign Immunities

[4] References preceded by "App." refer to pages in the Appendix hereto.

Act (28 U.S.C. § 1330)[5] and federal question (28 U.S.C. § 1331) under the Warsaw Convention, a treaty of the United States. Pet. App. at 33a.

It is undisputed that the liability of OLYMPIC is governed exclusively by the Warsaw Convention, as supplemented by the Montreal Agreement,[6] because Dr. Hanson's death occurred during the course of "international transportation" by air within the meaning of Article 1 of the Convention. *See* Warsaw Convention, Article 1 (App. at 1a).[7] Article 17 of the Warsaw Convention creates a presumption of air carrier liability for passenger injury or death if caused by an "accident" within the meaning of the Convention. *See Air France v. Saks*, 470 U.S. 392, 405-07 (1985). The Warsaw Convention, together with the Montreal Agreement, serves to limit an air carrier's Article 17 liability for a passenger's bodily injury or death to the sum of $75,000, unless the injury or death was proximately caused by the air carrier's "wilful misconduct" within the meaning of Article 25 of

[5] OLYMPIC is a "foreign state" within the meaning of the 28 U.S.C. § 1603 of the Foreign Sovereign Immunities Act, as the majority of its shares are owned by the government of Greece. Pet. App. at 33a, n.1.

[6] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, *reprinted in note following* 49 U.S.C. § 40105 (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302) ("Montreal Agreement"). Pursuant to the Montreal Agreement, air carriers, by special contract, voluntarily agreed to increase the Article 22 limit of liability to $75,000 and to waive the defense of all necessary measures for passenger injury or death set forth in Article 20(1) (App. at 12a) of the Warsaw Convention. *See Air France v. Saks*, 470 U.S. 392, 406-07 (1985).

[7] Decedent was traveling pursuant to a ticket that provided for round-trip transportation by air, United States/Greece/Egypt/Greece/United States.

the Convention, in which event the monetary limit on recoverable damages is not available to the carrier.

B. Statement of the Relevant Facts

The following facts are based upon the Findings of Fact of the district court as adopted by the court below. *See* Pet. App. at 3a-9a.

Decedent's Pre-Existing Physical Condition. For more than 20 years prior to his death at age 52, Dr. Hanson suffered from asthma for which he did not receive regular treatment. Pet. App. at 3a-4a. Dr. Hanson also suffered from severe food allergies. Pet. App. at 4a-5a.

At trial, experts for both parties agreed that at least one of Dr. Hanson's medical emergencies in the two years preceding his death was caused by food-related allergies. Pet. App. at 5a. During this incident, paramedics were summoned and CPR performed prior to his hospitalization. *Id.* In light of his existing medical condition, Dr. Hanson carried an emergency kit containing epinephrine in the event of an allergic reaction to food (*id.*) and a Proventil/Albuterol inhaler to aid his breathing. Pet. App. at 4a.

The Trip to Cairo. In December 1997, Dr. Hanson and his family flew from San Francisco to Cairo for vacation. Pet. App. at 5a. The trip involved a stop in New York, where Dr. Hanson learned that OLYMPIC allowed smoking on international flights. *Id.* Dr. Hanson and his family asked for and were assigned seats in the non-smoking section of the aircraft. *Id.* The flight to Cairo was uneventful. Pet. App. at 6a.

The Return Trip to New York. On January 4, 1998, Dr. Hanson and his family began the return trip from Cairo to the United States via Athens. Pet. App. at 6a. During check-in at Cairo, Dr. Hanson, aware that smoking was allowed on OLYMPIC flights, requested and was assigned a non-smoking seat for the entire return journey to the United States. Pet. App. at 6a. Ms. Husain also showed the check-in agent a letter, written by Dr. Hanson's brother, also a doctor, which stated that "Mr. Abid Hanson has history of recurrent anaphylactic reactions. He has been advised to carry oxygen and epinephrine as a precaution." J.A. at JA81.[8] Dr. Hanson was seated in the non-smoking section on the flight from Cairo to Athens and did not experience any breathing problems. Pet. App. at 6a. During a three to four hour layover in Athens, however, Dr Hanson began experiencing difficulties with his breathing in the airport waiting area, which was very smoky, and had to use his inhaler. *Id.*

Upon boarding OLYMPIC flight 417 from Athens to New York, Dr. Hanson noticed that he was seated in non-smoking row 48 and the smoking section began in row 51.[9] Pet. App. at 6a, n. 3. Ms. Husain, Dr. Hanson's wife, approached OLYMPIC flight attendant Maria Leptourgou, informed her that Dr. Hanson could not be near the smoking section, and asked Ms. Leptourgou to move Dr. Hanson to another non-smoking seat. Pet. App. at 6a. Ms. Leptourgou responded by telling Ms. Husain to "have a seat." *Id.* After all of the passengers were seated, but before take-off, Ms. Husain again approached Ms. Leptourgou and asked that she move Dr. Hanson to a different non-smoking seat, explaining that he was allergic to smoke. Pet. App. at 7a. Ms. Husain testified that Ms. Leptourgou replied that she could not transfer Dr. Han-

[8] The Court below mistakenly stated that the letter indicated that Dr. Hanson had asthma. Pet. App. at 6a.

[9] The aircraft was a Boeing 747-212 with 426 seats in 56 rows. In economy class, rows 14-50 were in the non-smoking section and rows 51-56 were in the smoking section. Pet. App. at 6a, n. 3.

son to another seat because the plane was "totally full," and that she was too busy at the moment to assist Dr. Hanson. *Id.* Discovery revealed that flight 417 had 11 unoccupied seats: 2 business class; 6 non-smoking economy class; and 3 smoking economy class. Pet. App. at 7a, n. 5.

Shortly after take-off, the passengers in the smoking section began to smoke and Dr. Hanson indicated to his wife that the smoke was bothering him. Pet. App. at 7a. Ms. Husain approached Ms. Leptourgou and told her that she needed to move Dr. Hanson for health reasons. *Id.* Ms. Leptourgou reiterated that the "plane is full," but also invited Ms. Husain to ask other passengers if they would switch seats with Dr. Hanson. *Id.* Ms. Husain never did so, electing to return to her seat. Pet. App. at 40a.

After the meal service (approximately 90 minutes after departure), the smoking increased and Dr. Hanson's breathing problems worsened. Pet. App. at 8a. Dr. Hanson walked to the front of the cabin to get some fresh air. *Id.* Upon reaching the front of the cabin, Dr. Hanson asked for his epinephrine kit. *Id.* Ms. Husain retrieved the kit, administered a shot, and notified Dr. Umesh Sabharwal, an allergist and family friend who was traveling with the Hanson/Husain family. *Id.* Dr. Sabharwal helped Dr. Hanson to the floor, administered another shot of epinephrine, then began performing CPR and also administered a shot of Bricanyl. *Id.* Despite the efforts of Dr. Sabharwal and other passengers who assisted, Dr. Hanson died. *Id.* No autopsy was performed to determine the direct cause of death. *Id.*

C. The Findings of Fact and Conclusions of Law of the District Court

Following the denial of OLYMPIC's motion for summary judgment, which argued that Dr. Hanson's death was not caused by an "accident," a precondition to liability under Article 17 of the Warsaw Convention, the case proceeded to trial.[10] At trial, plaintiffs argued that Dr. Hanson died from a severe asthma attack caused by inhaling second-hand smoke. OLYMPIC argued that Dr. Hanson's death was the result of an allergic reaction to food or some other medical problem unrelated to the smoke and, in any event, was not caused by an Article 17 "accident."

The district court issued its Findings of Fact and Conclusions of Law on August 28, 2000, as amended on October 3, 2000, and although the district court specifically recognized that "the smoke in the cabin was not the 'unusual' or 'unexpected' event which caused Dr. Hanson's death," the district court found that "the smoke undoubtedly had a significant place in the causal chain." Pet. App. at 51a. In a misplaced reliance on *Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 142 (2d Cir. 1998), the district court held that that the "negligent failure of a flight crew to appropriately serve the needs of an ailing passenger can be considered an 'accident' under the Convention." Pet. App. at 50a. The district court ultimately held that flight attendant Leptourgou's failure to act upon Ms. Husain's requests to reassign Dr. Hanson to a seat further from the designated smoking area of the aircraft was the "accident" under Article 17 of the Warsaw Convention, and that this negligent omission proximately caused his death. Pet. App. at 59a-60a. The

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[10] The case was tried to the district court in accordance with the Foreign Sovereign Immunities Act, which provides for non-jury civil actions. 28 U.S.C. §§ 1330(a), 1605. Pet. App. at 33a, n. 1.

district court further found that Ms. Leptourgou's refusal to reassign Dr. Hanson to another non-smoking seat constituted "wilful misconduct" under Article 25 of the Warsaw Convention. Pet. App. at 67a.

The district court, however, found Dr. Hanson 50% at fault for his own death because he failed to take any action to change his seat. Pet. App. at 78a. The district court awarded plaintiffs $1,400,000 in pecuniary damages, but reduced the award by 50% due to Dr. Hanson's comparative fault. Pet. App. at 79a-80a.

On November 28, 2000, the district court issued Supplemental Findings of Fact and Conclusions of Law awarding plaintiffs an additional $1,400,000 (reduced to $700,000) in non-pecuniary damages. Pet. App. at 31a. Final judgment in the amount $1,400,000 was entered on November 28, 2000. Pet. App. at 22a. OLYMPIC timely appealed.

D. The Decision of the Court of Appeals

The Court of Appeals affirmed the district court's conclusion of law that Dr. Hanson's death was caused by an Article 17 "accident."

Article 17 Accident. The court below found that the OLYMPIC flight attendant's failure to move Dr. Hanson to a different non-smoking seat violated industry standards and OLYMPIC procedures and was an "accident" under Article 17 of the Warsaw Convention. Pet. App. at 14a. The court below held:

> Ms. Leptourgou's failure to act was more egregious in light of the simple nature of Ms. Husain's request, which could easily have been satisfied without interference with the airplane's normal operation. Combined, these factors bring Ms. Leptourgou's failure to assist Dr. Hanson within the meaning of an "accident" for Article 17 purposes. Her conduct was clearly external to Dr. Hanson, and it was unexpected and unusual in light of industry standards, Olympic policy, and the simple nature of Dr. Hanson's requested accommodation. **The failure to act in the face of a known, serious risk satisfies the meaning of "accident" within Article 17 so long as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane.**

Pet. App. at 14a (emphasis added).

Article 17 Causation. Although the court below recognized that for "a carrier to be liable for an injury, the passenger must prove the accident caused the injury," the court nevertheless held that the "accident need not be the sole cause of the injury," and that it is sufficient if it is any "link in the chain." Pet. App. at 16a. The court below combined the factors to find that "the exposure to smoke and failure to move Dr. Hanson is such a link." Pet. App. at 16a-17a.

Article 25 Wilful Misconduct. The court below affirmed the district court finding that the death of Dr. Hanson was proximately caused by the wilful misconduct of OLYMPIC. The court stated: "Ms. Leptourgou's failure to take action, either by moving Dr. Hanson or by notifying the chief cabin attendant of Ms. Husain's request to have her husband moved, was willful misconduct." Pet. App. at 19a.

SUMMARY OF ARGUMENT

The legal question before the Court is whether, as a matter of treaty law, an airline's failure to assist a passenger during the course of a normal flight, resulting in

an aggravation of the passenger's pre-existing internal condition, can satisfy the "accident" condition precedent to liability under Article 17 of the Warsaw Convention, when considerations of air carrier fault are expressly relegated to Article 20(1) of the Convention. The Ninth Circuit, in affirming the decision of the district court, improperly found that it can.

Only by an incomplete and improper application of the definition of "accident" as set forth by the Court in *Saks* was the court below able to create an "accident" within the meaning of Article 17, which was based upon its combining the flight attendant's "failure to act" with the normal and expected presence of ambient smoke on this flight. Pet. App. at 14a. The Warsaw Convention cannot sensibly or properly be so interpreted.

The Ninth Circuit's interpretation of Article 17 of the Warsaw Convention:

- is contrary to the language, structure and goals of the Warsaw Convention—a primary goal of the Convention was to limit air carrier liability and a carrier's negligent omissions are irrelevant to a determination of what meets the "accident" condition precedent to liability;
- fails to apply the full holding of *Saks*, which made clear that (1) an injury resulting from the passenger's own internal reaction to the normal operation of the aircraft is not caused by an "accident," and (2) "the care taken by the airline to avert the injury" is not relevant to the "accident" inquiry, 470 U.S. at 406-407;
- is contrary to the well-reasoned Third and Eleventh Circuit decisions, which hold that an injury resulting from the passenger's own internal reaction to normal flight operations cannot

be an "accident," even if the carrier's negligent failure to assist aggravated the passenger's pre-existing condition or was a link in the chain of causation;

- is an improper attempt to circumvent the Court's holding in *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999), in that it engrafts onto the Warsaw Convention irrelevant, pre-empted state law negligence principles; and
- is at odds with the post-ratification understanding of the Contracting States to the Convention that the term "accident" does not impose liability for an injury resulting from the state of the health of the passenger.

Accordingly, the decision of the court below should be reversed in all respects.

ARGUMENT

I

THE "ACCIDENT" STANDARD CREATED BY THE COURT BELOW IS IRRECONCILABLE WITH THE LANGUAGE, STRUCTURE AND NATURE OF AIR CARRIER LIABILITY CREATED BY THE WARSAW CONVENTION

It is undisputed that the rights and liabilities of the parties herein are governed exclusively by the Warsaw Convention. *See Tseng*, 525 U.S. at 171-72. As stated by the Court in *Tseng*, recovery "if not allowed under the Convention, is not available at all." *Id.* at 161. The decision of the court below can only be sensibly read as a reflection of its unwillingness to enforce the Warsaw

Convention, as interpreted by the Court in *Saks* and *Tseng*, because to do so would leave plaintiffs without a remedy. As the Court has recognized, however, it is not within the province of the courts to rewrite this treaty. *Tseng*, 525 U.S. at 673, n. 12.

The relevant provisions of the Warsaw Convention concerning the liability of the air carrier for passenger injury are Articles 17, 20 and 21(1), which set forth the circumstances under which an air carrier may be liable to passengers.

Article 17, which creates a presumption of liability on the part of the air carrier for a passenger injury or death, provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 20(1), which enables the air carrier to rebut the presumption of liability based upon the reasonable actions of the carrier, provides:

> The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

Article 21, which enables the air carrier to diminish or exclude liability based upon the actions of the passenger, provides:

> If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

The decision of the court below that an air carrier can be absolutely liable under Article 17 for a failure to prevent a passenger from being exposed to the known, normal, expected and usual operation of its flight is wrong and was premised on a fundamental misunderstanding of the nature of the liability created by the Warsaw Convention. A passenger seeking to hold a carrier liable for injury has the burden of establishing that: (1) there has been an "accident," which caused (2) the passenger's death, wounding or bodily injury, and (3) the "accident" took place on board the aircraft or in the course of the operations of embarking or disembarking. *See Eastern Airlines v. Floyd*, 499 U.S. 530, 535-36 (1991). Because the "accident" condition precedent to liability never was established, a basis for Convention liability never arose.

A. The Principles of Treaty Interpretation

Interpretation of the Warsaw Convention begins "with the text of the treaty and the context in which the written words are used." *Saks*, 470 U.S. at 397. Fundamentally, the purposes of a treaty must be upheld and meaningful effect is to be given to the expectations of the contracting parties. *Id.* at 399. As treaties are construed more liberally than private agreements, it also is proper to look beyond the written words to the history of the treaty, the negotiations and the practical construction adopted by the parties. *Id.* at 396, 400, 403; *see Tseng*, 525 U.S. at 167; *Zicherman v. Korean Air Lines*, 516 U.S. 217, 226 (1996); *Floyd*, 499 U.S. at 535, 546.

B. Negligence Is Irrelevant To The Accident Inquiry Because The Treaty's Founders Intended Carrier Liability To Be Presumed If There Was An "Accident"

By focusing the "accident" inquiry on common law notions of negligence (*e.g.*, "failure to act in face of a known, serious risk;" "reasonable alternatives;" "minimize the risk") (Pet. App. at 14a), rather than the precise factual "event" that caused the injury, the court below misapprehended the nature of the liability created by Article 17 and engaged in an analysis that the drafters of the Convention expressly sought to avoid.

The Twin Goals of the Warsaw Convention. The Warsaw Convention was the result of two international conferences, the first held in Paris in 1925, and the second in Warsaw in 1929, and extensive preparatory work by the *Comité International Technique d'Experts Juridiques Aériens* ("CITEJA"), which held meetings between the two conferences and had the primary responsibility for preparing the draft convention and reports. *See Chan v. Korean Air Lines*, 490 U.S. 122, 139 (1989).[11] The Warsaw Convention had two primary goals: first, to create but limit the liability of air carriers; and second, to define and establish uniform rules governing claims arising out of international air transportation. *See Tseng*, 525 U.S. at 169-70; *Zicherman*, 516 U.S. at 230; *Floyd*, 499 U.S. at 546. As the Court in *Floyd* explained, "in 1929 the parties were more concerned with protecting air carriers and fostering a new industry than providing full recovery to injured passengers. . . ." 499 U.S. at 546.

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[11] For a discussion of the goals and drafting history of the Convention, see Andreas F. Lowenfeld & Alan I. Mendelson, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967); John J. Ide, *History and Accomplishments of C.I.T.E.J.A.*, 3 J. Air. L. & Com. 27 (1932).

The Nature of Liability Created by the Warsaw Convention. While the overall liability system created by the Warsaw Convention is fault based, rather than risk based, the liability created by Article 17 is not fault based. *See Second International Conference on Private Aeronautical Law, Oct.* 4-12, 1929, *Minutes* at 21, 252 (R. Horner & D. Legrez transl. 1975) ("*Warsaw Minutes*"). Article 17 creates a presumption of carrier liability triggered by the happening of an "accident." *Id.* This presumption, however, can be rebutted if the carrier proves the absence of fault under Article 20(1) or the comparative negligence of the passenger under Article 21. *Id.; see also* Secretary of State Cordell Hull's transmittal of the Warsaw Convention to the United States Senate, Senate Comm. on Foreign Relations, "*Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules*," Sen. Exec. Doc. No. G, 73rd Cong., 2d Sess. 3-4 (1934) (*reprinted in* 1934 U.S. Av. Rep. 240, 243).

The liability created by the Convention's drafters was intended to change the then prevailing practice by carriers in civil law countries (the vast majority of the Contracting States) of contractually disclaiming liability for passenger injury or death. *See Warsaw Minutes* at 47-48; *see also Tseng*, 525 U.S. at 170; *Sidhu v. British Airways* [1997] 2 Lloyd's Rep. 76, 83-84, 87-88, 1996 WL 1092197, at *83-83, *87-88 (House of Lords 1996) (U.K.). Having taken away the carriers' ability to disclaim liability, the drafters limited the nature and scope of the liability that they created. The Convention was drafted as a compromise between those interests (*Tseng*, 525 U.S. at 170) and represents a bargain between air carriers and passengers—the carriers gain from the limitation of liability (Article 22) but the passengers benefit from the "clear presumption of liability, which eliminated the difficult task of proving fault on the part of the

carrier." *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1489 (D.C. Cir. 1991); *see In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 928 F.2d 1267, 1271 (2d Cir. 1991); *see also* Secretary of State Cordell Hull's transmittal letter, Sen. Exec. Doc. No. G, 73rd Cong., 2d Sess. 3-4 (1934) (*reprinted in* 1934 U.S. Av. Rep. 240, 243); *Warsaw Minutes* at 252.

The focus of the court below on the "negligence" of OLYMPIC as its justification for concluding that the "accident" condition precedent was met in this case, rather than on the precise factual "event" that was the cause of the injury (*i.e.*, allegedly the ambient cigarette smoke), was contrary to the express language of Article 17 and its interplay with Article 20(1) within the structure of the Convention. The existence of carrier fault simply is not relevant in determining whether the liability presumption in Article 17 applies. The sole proper inquiry envisaged by the drafters is into "the nature of the event which *caused* the injury." *Saks*, 470 U.S. at 407 (emphasis in original). Here, Dr. Hanson's own internal reaction to sitting in a non-smoking seat and being exposed to normal and expected cabin air conditions, *i.e.*, cigarette smoke on a flight where smoking was permitted, was improperly found to be an "accident."

II

THE DECISION OF THE COURT BELOW VIOLATES THE THREE BASIC TENETS OF *SAKS*

The meaning of the term "accident" was addressed by the Court in *Saks*, which involved an action against the carrier by a passenger who suffered an ear injury caused by normal cabin pressurization changes prior to landing.

After reviewing the language, drafting history and structure of the Convention, the Court found that a "passenger's injury must be caused by an accident, and an accident must mean something different than an 'occurrence' on the plane." *Saks*, 470 U.S. at 403. The Court defined an "accident" as "an unexpected or unusual event or happening that is external to the passenger." *Id.* at 405. The Court also made clear that "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply." *Id.* at 406. Although the "definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries" (*id.* at 405), it is especially clear that issues of crew negligence are not implicated or relevant to Article 17, but rather are the province of Article 20(1). The "accident" inquiry focuses solely on the "nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury." 470 U.S. at 407 (emphasis in original). Thus, *Saks* stands for the following three tenets:

1. The presumption of liability under Article 17 cannot rest upon a mere "occurrence" of an injury; rather, the passenger's injury must be "caused by" an "accident," defined by the Court as an "unexpected or unusual event or happening that is external to the passenger" (470 U.S. at 405);

2. While the definition should be flexibly applied, "when the injury indisputably results from the passenger's own internal reaction to the usual, normal and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply" (470 U.S. at 406); and

3. The "accident" requirement of Article 17 "involves an inquiry into the nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury" (470 U.S. at 407 (emphasis in original)).

The decision of the court below misapplies the first and second tenets of *Saks* and ignores its third tenet.

A. A Failure To Act Is Not An "Event Or Happening"

The court below found that the OLYMPIC flight attendant's "failure to act" on Ms. Husain's request to transfer Dr. Hanson to another non-smoking seat (*i.e.*, an omission), was

> an "accident" for Article 17 purposes. Her conduct was clearly external to Dr. Hanson, and it was unexpected and unusual in light of industry standards, Olympic policy, and the simple nature of Dr. Hanson's requested accommodation.

Pet. App. at 14a.

This omission, however, cannot be considered an "event or happening" because Article 17 requires a discernable event or happening which then causes an injury. Simply stated, while an omission can cause an "accident," it cannot be ***the*** "accident."

Indeed, each of the cases cited by the Court in *Saks* as an example of an "accident" involved an affirmative act, ***not*** a failure to act. *See Saks*, 470 U.S. at 404-05. For example, in the hijacking, terrorist attack and passenger tort cases,[12] the "accident" was not the failure of the airline to prevent the "event or happening" (*e.g.*, the hijacking, terrorist attack, or tort), but rather the happening of the event itself, which was unusual and unexpected. In contrast, the cases cited by the Court in *Saks* as instances where the accident requirement was not satisfied, either the injury was due to the peculiar internal condition of a passenger and involved a carrier's failure to act,[13] or there was no discernible event or happening.[14]

The court below did not cite to any authority to support its "accident" analysis (other than a partial recitation of the first and second tenets of *Saks*), and the cases relied upon by the district court do not involve a crew's failure to act or an injury due to the peculiar internal condition of the passenger. Pet App. 50a-51a. The district court, primarily relying upon *Fishman v. Delta Air Lines, Inc.*, 938 F. Supp. 228 (S.D.N.Y. 1996), *aff'd*, 132 F.3d 138 (2d Cir. 1998), stated that the "negligent failure of the flight crew to appropriately serve the needs of an ailing passenger can be considered an 'accident' under the Convention." Pet. App. 50a. The district court below overlooked that the air carrier in *Fishman* did not exacerbate a passenger's pre-existing internal ailment. 938 F. Supp. at 230. Rather, the "accident" in *Fishman* was the flight attendant's application of a scalding hot compress to the passenger's ear (an unusual and unexpected "act") resulting in a burn (bodily injury). 132 F.3d at 142. An inquiry into whether the flight attendant

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12 *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977) (en banc) (terrorist attack); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975) (en banc) (terrorist attack); *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (C.D. Cal. 1975) (hijacking); *Oliver v. Scandinavian Airlines System*, 17 Av. Cas. (CCH) 18,283 (Md. 1983) (passenger tort).

13 *Abramson v. Japan Airlines, Co., Ltd.*, 739 F.2d 130, 133 (3d Cir. 1984) (discussed *infra* at 22-23).

14 *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971); *Scherer v. Pan American World Airways, Inc.*, 54 A.D.2d 636, 387 N.Y.S.2d 580 (N.Y. App. Div. 1976).

had followed or failed to follow proper procedures (*i.e.*, negligence) was irrelevant and unnecessary to the accident inquiry.[15] Such an inquiry would have been relevant only if the carrier had raised the Article 20(1) "all necessary measures" defense, which was not raised in that case or this case.

The other cases relied upon by the district court also did not involve the state of the passenger's health or affirmative acts by the air carrier. Pet. App. at 50a-51a. Properly analyzed, the district court should have recognized that *Schneider v. Swiss Air Transport Co. Ltd.*, 686 F. Supp. 15 (D. Me. 1988), was not an "accident" case; that the possible "accident" in *Langadinos v. American Airlines, Inc.*, 199 F.3d 68, 71 (1st Cir. 1999), was the assault by the passenger, and not the over-service of alcohol by the crew which allegedly triggered the assault; and that in *Carey v. United Airlines*, 77 F. Supp. 2d 1165, 1171 (D. Or. 1999), *aff'd*, 255 F.3d 1044 (9th Cir. 2001), the "accident" was the affirmative improper, unusual and unexpected acts of the flight attendant (putting aside the issue of "bodily injury").

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15 Following its initial finding that the burns were caused by an accident, the *Fishman* court then stated, conforming its decision with the Second Circuit's "accident" analysis in *Tseng*, 122 F.3d 99, 103-04 (2d Cir. 1997), *rev'd in part*, 525 U.S. 155 (1999), that

> a claim *does* allege an "accident" if it arises from some inappropriate or unintended happenstance in the operation of the aircraft or airline. Thus, an injury resulting from routine procedures in the operation of an aircraft or airline can be an "accident" if those procedures or operations are *carried out* in an unreasonable manner.

Fishman, 132 F.3d at 143 (emphasis in original). This statement must be viewed in light of the injury producing "event" in *Fishman* (*i.e.*, applying the scalding compress) and is consistent with the view that the "event" must be an act rather than the failure to act.

The court below failed to recognize that the "accident" condition precedent to liability requires the passenger to establish an event or happening, and when the passenger relies upon the absence of a happening, *i.e.*, an omission, a passenger has not established an "accident" under Article 17.

B. An Injury That Results From The Passenger's Internal Reaction To The Usual And Normal Operation Of The Aircraft Is Not Caused By An "Accident"

Courts that have properly applied the three tenets of *Saks* have concluded that if the cause of a passenger's injury was due to the passenger's own internal reaction to a normal flight, there was no "accident," even if carrier negligence is alleged to have aggravated the passenger's pre-existing condition. *See Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1521-22 (11th Cir. 1997); *Abramson v. Japan Airlines, Co., Ltd.*, 739 F.2d 130, 133 (3d Cir. 1984) (pre-*Saks*).[16] The decision of the court below rejected these cases in its misapplication of the Warsaw Convention and the second tenet of *Saks*.

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16 *See also Hipolito v. Northwest Airlines, Inc.*, 2001 WL 861984, at *2-3 (4th Cir. July 31, 2001) (affirming summary judgment dismissing action because passenger's death on board an aircraft was not an Article 17 "accident," despite allegation of crew negligence); *Rajcoorar v. Air India Ltd.*, 89 F. Supp. 2d 324, 328 (E.D.N.Y. 2000) (inadequate medical care is not an "accident"); *Tandon v. United Air Lines*, 926 F. Supp. 366, 369-70 (S.D.N.Y. 1996) (failure to respond with adequate medical assistance to passenger suffering a heart attack is not an "accident"); *Fischer v. Northwest Airlines, Inc.*, 623 F. Supp. 1064, 1065 (N.D. Ill. 1985) (refusal to aid passenger after heart attack is not an "accident"). *Contra Seguritan v. Northwest Airlines, Inc.*, 86 A.D.2d 658, 446 N.Y.S.2d 397 (N.Y. App. Div. 1982), *aff'd* 57 N.Y.2d 767 (N.Y. 1982) (pre-*Saks*).

In the leading pre-*Saks* case of *Abramson*,[17] with facts strikingly similar to the case here, the issue was whether the airline's refusal to aid a passenger, which allegedly aggravated a pre-existing injury during the course of a normal flight was an Article 17 "accident." The Third Circuit held no. Plaintiff in *Abramson* suffered an attack of a pre-existing paraesophageal hiatal hernia while traveling from Anchorage to Tokyo on Japan Airlines ("JAL"). 739 F.2d at 131. When plaintiff's wife asked the flight attendant for a place where plaintiff could lie down and employ a self-help remedy, the attendant responded that there were no empty seats and plaintiff was required to remain in his assigned seat. *Id.* Discovery, however, revealed that there were nine empty seats in first class. *Id.* Plaintiff brought an action against JAL, claiming that JAL's "refusal to aid him" aggravated his injury, was an "unusual and unexpected happening" and, thus, was an Article 17 "accident." *Id.* at 132. Applying its "unusual or unexpected happening" test, the Third Circuit rejected the passenger's arguments and found that JAL's alleged "acts and omissions" did not constitute an "accident":

> In the absence of proof of abnormal external factors, aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an "accident" within the meaning of Article 17.

Id. at 133. Thus, "the occurrence that allegedly aggravated plaintiff's condition was not an 'accident' within

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17 The *Abramson* case presaged the three tenets of *Saks* and was cited as an example of the category of cases where "routine travel procedures . . . produce an injury due to the peculiar internal condition of a passenger," which the Court found does not fit within the definition of "accident" for purposes of the Convention. *See Saks*, 470 U.S. at 405.

the terms of Article 17 of the Warsaw Convention." *Id.* at 135.

Similarly, in *Krys*, the issue was whether the alleged aggravation of a pre-existing condition due to crew negligence during the course of a normal flight was an Article 17 "accident." The Eleventh Circuit also held no. Plaintiff in *Krys* suffered a heart attack during a transatlantic flight and brought an action against the air carrier claiming that the crew's failure to properly respond to his heart attack symptoms (*i.e.*, make an emergency landing rather than continuing to its destination), aggravated the damage to his heart. 119 F.3d at 1517. The air carrier argued that aggravation of a pre-existing condition due to crew negligence was an "accident" in an effort to limit the carrier's liability to $75,000. *Id.* at 1519. The Eleventh Circuit rejected the airline's argument and found that there was no Article 17 "accident." The *Krys* court found that the only correct approach to analyzing the "accident" requirement, which is consistent with the structure of the Convention and *Saks*, is to look "at the factual events, as opposed to an assertion of 'crew' negligence." *Id.* at 1521-22. The Eleventh Circuit explained:

> [I]f we substitute a purely factual description of the relevant events in place of the legal conclusion represented by "crew negligence," the conclusion that no "accident" occurred is seen as the more reasonable conclusion. If, in *Abramson*, the aggravating event is having to sit upright in an airline seat throughout the duration of the flight, then it seems clear that the aggravation does not arise from an "unexpected or unusual event"—instead, the aggravation injury arises solely from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." By the same

token, ***if, in the instant case, the aggravating event is the continuation of the flight from its scheduled point of departure to its scheduled point of arrival, [footnote omitted] then it seems clear that the aggravation injury arises not from an "unexpected or unusual happening," but rather from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft."***

119 F.3d at 1571 (emphasis added and citations omitted).

The Court should reject the justification offered by the court below for not following *Krys* and *Abramson*. Pet. App. at 12a-14a. A plain reading of the facts and holdings of each case evinces that they are indistinguishable from this case.

In *Abramson*, the passenger remained in his standard economy class seat rather than being moved to an empty first class seat at the request of the passenger's wife; in *Krys*, the passenger remained on the flight to its normal destination rather than the crew diverting the flight to a different destination; here, the passenger remained in his non-smoking seat rather than being moved to a different non-smoking seat at the request of Ms. Husain. Each case involved a passenger with a pre-existing internal physical ailment; each case involved an injury caused by the passenger being subjected to the normal conditions of the flight, which the passenger alleged resulted in injury; and each case involved allegations of the crew failing to act to prevent the passenger from being exposed to the normal conditions of the flight.

Looking to the purely factual description of relevant events, the aggravating event was Dr. Hanson remaining in his assigned non-smoking seat and being exposed to ambient smoke, which allegedly aggravated his pre-existing asthmatic condition leading to his death. As in

Abramson and *Krys*, the injury arose not from an "unexpected or unusual happening," but rather from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft."

C. A Carrier's Failure To Take Action To Avert An Internal Injury That Allegedly Occurred During The Course Of A Normal Flight Is Not An "Accident"

Both the court below and the district court incorrectly shifted the focus of the "accident" requirement from an inquiry into the nature of the event which caused the injury (*i.e.*, the smoke), to the care taken by the airline to avert the injury (*i.e.*, a flight attendant's failure to move Dr. Hanson to another non-smoking seat), thus ignoring the third tenet of *Saks*. In effect, the court below created a new negligence-based "accident" standard, as follows:

> The failure to act in the face of a known, serious risk satisfies the meaning of "accident" within Article 17 so long *as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane*.

Pet. App. at 14a (emphasis added); *see also* Pet. App. at 58a (district court).

The "accident" standard applied by the court below misconstrues the nature of the liability created by the Warsaw Convention by improperly focusing the "accident" inquiry on reasonableness, foreseeability and the carrier's mental state, despite the clear holding of *Saks*. 470 U.S. at 407. Neither the Convention nor *Saks* makes the "accident" inquiry contingent upon the perception of a risk, "reasonable alternatives," "minimiz[ing] the risk"

or whether "these alternatives would not unreasonably interfere with the normal, expected operation of the aircraft." Pet. App. at 14a.

The "accident" analysis fashioned by the court below improperly injects into Article 17 the concepts of "absence of negligence" (Article 20(1)) and "willful misconduct" (Article 25). The structure of the Convention and Article 17 do not permit the courts to relieve the passenger from meeting the conditions precedent to recovery under Article 17 through an analysis of the negligence of a carrier's employee. *See Saks*, 470 U.S. at 401-03; *Krys*, 119 F.3d at 1521; *Abramson*, 739 F.2d at 133-35. This construction is borne out by the treaty's drafting history.

The initial draft of the Convention considered at the international conference in Paris in 1925 combined the concepts of Articles 17 and 20 in then Article 5. The Paris draft Article 5 provided: "The carrier is liable for accidents, losses, breakdowns, and delays. It is not liable if it can prove that it has taken reasonable measures designed to pre-empt damage . . . ." *Saks*, 470 U.S. at 401. Between 1925 and 1928, the Paris draft was revised several times by CITEJA.

The preliminary draft Convention was finalized at the Third Session of CITEJA in May, 1928, and submitted to the delegates at the 1929 Warsaw conference. *Warsaw Minutes* at 245-46, 257-68. Article 21 of the 1928 preliminary draft (which eventually became Article 17) made the air carrier liable "in the case of death, wounding, or other bodily injury *suffered* by a traveler." *Saks*, 470 U.S. at 401 (emphasis added). The all reasonable measures defense had been removed from the liability provision and placed into a separate article, draft Article 22 (which eventually became Article 20(1)). *Id.*

During the Warsaw conference, the drafting committee further changed the liability provisions of Article 21 by expressly narrowing the liability of the air carrier to encompass only an injury "caused" by an "accident." *Id.* at 402-03; *see Tseng*, 525 U.S. at 173. The court below overlooked that the "accident" requirement of Article 17 is separate and distinct from the due care defense of Article 20(1). *See Saks*, 470 U.S. at 407; *Krys*, 119 F.3d at 1522. The Court in *Saks* recognized this structure in stating:

> The "accident" requirement of Article 17 . . . involves an inquiry into the nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury.

470 U.S. at 407 (emphasis in original). This statement in *Saks* further confirms that under the structure of the Convention the failure to act (*i.e.*, avert) cannot be an "accident."

As explained by the Eleventh Circuit in *Krys*:

> Having provided for a defense turning on the absence of negligence, we think it is unlikely that the drafters intended that the initial "accident" inquiry be resolved by reference to negligence. *Cf. Air France*, 470 U.S. at 407. . . .

119 F.3d at 1522.[18]

The drafting history, as evidenced by the structure of the Convention, demonstrates that the initial "accident" inquiry should not be resolved by reference to negli-

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[18] The fact that negligence is irrelevant to the Article 17 "accident" inquiry is confirmed by the ultimate holding in *Krys*, which after finding that there was no "accident," upheld the lower court's finding that the carrier was negligent under state law. *Krys*, 119 F.3d at 1528.

gence, foreseeability, alternatives or the degree of the carrier's culpability, which were relegated to Article 20(1) and Article 25, respectively. *See Saks*, 470 U.S. at 407; *see also Carey v. United Airlines*, 255 F.3d 1044, 1048 (9th Cir. 2001) (definition of "accident" makes "no mention of the carrier's motive or mental state whatsoever"). Thus, the finding that a flight attendant's failure to act satisfies the "accident" condition precedent in Article 17 cannot be reconciled with the structure of the Convention and the three tenets of *Saks*.

III

THE DECISION OF THE COURT BELOW IMPROPERLY NULLIFIES THE RESULT MANDATED BY *TSENG* AND *SAKS*

Prior to 1999, there was near unanimity among the lower courts that an injury arising out of a passenger's pre-existing medical condition was not an Article 17 "accident," even if there were allegations of crew negligence. *See supra* note 16 and accompanying text. In 1999, the Court in *Tseng* addressed the question of the exclusivity of the Warsaw Convention and held that "recovery for a personal injury suffered 'on board [an] aircraft or in the course of any of the operations of embarking or disembarking,' if not allowed under the Convention, is not available at all." *Id.* at 161 (citation omitted). The effect of *Tseng* was to foreclose all recourse to state negligence law in actions brought in the United States, the same result already recognized in the United Kingdom two years earlier. *See Sidhu v. British Airways* [1997] 2 Lloyd's Rep. 76, 1996 WL 1092197 (House of Lords 1996) (U.K.).

While the Court in *Tseng* addressed the consequence of failing to meet the conditions precedent of Article 17, *Tseng* did not present the issue of when those conditions are satisfied. After *Tseng*, the lower courts began to interpret Article 17 anew, such that the same circumstances would lead to a different result—pre-*Tseng*, an occurrence that was not an "accident" precluded a claim under the Convention but not necessarily under state law; post-*Tseng*, some lower courts have found that a similar occurrence is an "accident" so that a claim can be made under the Convention. *See, e.g., Blansett v. Continental Airlines, Inc.*, 246 F. Supp. 2d 596 (S.D. Tex. 2002), *appeal docketed*, No. 03-40545 (5th Cir. April 24, 2003); *Gupta v. Austrian Airlines*, 211 F. Supp. 2d 1078, 1084 (N.D. Ill. 2002); *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 666 (S.D.N.Y. 2001);[19] *McCaskey v. Continental Airlines, Inc.*, 159 F. Supp. 2d 562, 573 (S.D. Tex. 2001); *Kemelman v. Delta Air Lines, Inc.*, 293 A.D.2d 576, 740 N.Y.S.2d 434 (N.Y. App. Div. 2002).

The courts below opted to embark on the incorrect path taken by these post-*Tseng* cases, rather than adhere to the analysis set forth in *Krys*, *Abramson* and *Saks*. The district court rejected *Krys* and *Abramson* based in part on a perceived dissolution of a carrier's duty of care and what that court saw as the "sudden sea change" as to the meaning of "accident" after *Tseng* (Pet. App. at 58a), leading both of the courts below to improperly define "accident" in terms of negligence principles. Pet. App. at 14a, 58a. No basis in law or fact exists for such a misapplication of the term "accident."

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[19] Following a bench trial on the merits, the court found that there was no deviation from the airline's procedure or industry standards and entered judgment in favor of the airline. *Fulop v. Malev Hungarian Airlines*, 244 F. Supp. 2d 217 (S.D.N.Y. 2003).

"[I]t is the function of Congress, and not of this Court, to decide that domestic law, alone or in combination with the Convention, provides inadequate deterrence." *Zicherman*, 516 U.S. at 231. "Postratification adjustments," if indeed any are necessary, "are appropriately made by the treaty signatories," not the courts. *Tseng*, 525 U.S. at 673 n12. *Sidhu* and *Tseng*'s holdings that a passenger's exclusive remedy is provided by the Warsaw Convention do not change the Article 17 "accident" analysis, do not render pre-*Tseng* decisions meaningless and do not justify misapplication of a treaty. The passengers in *Saks* and *Tseng* were left without a right of recovery and the treaty language has not changed so as to permit the courts below to deviate from the same result in this case.[20] As the Ninth Circuit held in *Carey*: "To the extent that such plaintiffs are left without a remedy, no matter how egregious the airline's conduct, that is a result of the deal struck among the signatories to the Warsaw Convention." 255 F.3d at 1053. The lower courts must give effect to the drafters' recognition that the Convention does not provide a recovery for every injured passenger. *See Floyd*, 499 U.S. at 546.

These same principles were expressed by the decision of the House of Lords in *Sidhu v. British Airways* [1997] 2 Lloyd's Rep. 76, 83-83, 1996 WL 1092197 (House of Lords 1996) (U.K.), in finding that the Warsaw Convention provides the sole basis for carrier liability:

> An answer to the question which leaves claimants without a remedy is not at first sight attractive. It is tempting to give way to the argument that where there is a wrong there must be a remedy. That

[20] Similarly, a passenger that cannot satisfy the "bodily injury" requirement of Article 17 is not entitled to any recovery. *See Floyd*, 499 U.S. at 552.

> indeed is the foundation upon which much of our own common law has been built up. The broad principles which provide the foundation for the law of delict in Scotland and of torts in the English common law have been developed upon these lines. No system of law can attempt to compensate persons for all losses in whatever circumstances. But the assumption is that, where a breach of duty has caused loss, a remedy in damages ought to be available.
>
> Alongside these principles, however, there lies another great principle, which is that of freedom of contract. Any person is free, unless restrained by statute, to enter into a contract with another on the basis that his liability in damages is excluded or limited if he is in breach of contract. Exclusion and limitation clauses are a common feature of commercial contracts, and contracts of carriage are no exception. It is against that background, rather than a desire to provide remedies to enable all losses to be compensated, that the Convention must be judged. It was not designed to provide remedies against the carrier to enable all losses to be compensated. It was designed instead to define those situations in which compensation was to be available. So it set out the limits of liability and the conditions under which claims to establish that liability, if disputed, were to be made. A balance was struck, in the interests of certainty and uniformity.

[1997] 2 Lloyd's Rep. at 87, 1996 WL 1092197, at *87.

Accordingly, "[u]ntil Article 17 of the Warsaw Convention is changed by the signatories, it cannot be stretched to impose carrier liability for injuries that are not caused by accidents." *Saks*, 470 U.S. at 406.

IV

THE CONTRACTING PARTIES' POST-RATIFICATION UNDERSTANDING OF ARTICLE 17 CONFIRMS THAT THE "ACCIDENT" PRECONDITION TO LIABILITY CANNOT BE MET WHERE THE ALLEGED INJURY RESULTS FROM THE PASSENGER'S STATE OF HEALTH

The post-ratification conduct of the contracting parties to the Warsaw Convention from 1949 to as recently as May 1999 further confirms that the Convention does not extend liability to injuries arising out of the passenger's state of health.

1949. Twenty years after its entry into force, consideration was given by the Legal Committee of International Civil Aviation Organization ("ICAO") to replace the treaty's Article 17 term "accident" with "occurrence" (as used in Article 18 which creates liability for baggage and cargo). The ICAO Legal Committee, however, decided to continue the distinction between "accident" in Article 17 and "occurrence" in Article 18, because "occurrence" would be "too broad" if applied to a passenger injury or death. ICAO Legal Committee, *Minutes and Documents of the Fourth Session, Montreal, 7 June–18 June 1949, Report of the Sub-Committee on the Revision of the Warsaw Convention*, ICAO Doc. 6027-LC/124 at 270 (1949). In discussing the distinction, it was noted that "the broader term 'occurrence' should be applied to damage sustained in the case of carriage of cargo or baggage, *since the term would include not only an accident but also cases where nothing of a positive nature had happened. . . .*" *Id.* (emphasis added). The rejection of this proposed change reflected the consensus of opinion that while an omission may be an "occurrence" under Article 18, it is not an "accident" under Article 17.

1951-1955. At the ICAO Legal Committee at the Madrid meeting in 1951, the Belgian Delegate proposed to substitute the word "occurrence" to broaden the liability of the air carrier. ICAO Legal Committee, *Minutes and Documents of the Eighth Session, Madrid, 11 September–28 September 1951*, ICAO Doc. 7229-LC/133 at 136-138 (1951). In objecting to this proposed change, Mr. Goodfellow, the Delegate from the International Union of Aviation Insurers, stated:

> [I]t was not logical to extend this system to the case of an occurrence. . . . air sickness would be covered and passengers could bring action for damages if they suffered from air sickness. In such an event, the carrier would have to prove that he had taken all necessary measures to avoid the damage or that he was unable to take such measures. To take necessary measures in the case of air sickness would be not to have the aircraft fly if there were danger that a passenger would be air sick. That would be the result of the Belgian proposal.

Id. at 137-38. Several other delegates, including the Chairman of the U.S. delegation, Mr. Nunneley, joined Mr. Goodfellow in opposing this change. *Id.* This proposal was narrowly[21] and only temporarily adopted; it was rejected at the next ICAO Legal Committee meeting (Rio de Janeiro in 1953), where the Committee voted to retain the term "accident." *See* ICAO Legal Committee,

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[21] *See Report of the U.S. Delegation to the Eighth Session of the Legal Committee of ICAO, Madrid, Spain, September 1951* at § (e)(1) (Emmory T. Nunneley, Jr., Chairman, U.S. Delegation), *excerpts reprinted in* 19 J.A.L.C. 70, 79 (1952) (noting that "the vote by which the Committee approved 'occurrence' was so small . . . that it seems clear that the vote was not representative, and this matter will have to be the subject of further consideration in the Committee.").

Minutes of the Ninth Session, Rio de Janeiro, 25 August–12 September 1953, ICAO Doc. 7450-LC/136-1 at 71 (1954).[22]

No changes were proposed to Article 17 at the diplomatic conference convened in 1955 at The Hague to consider what eventually became the Hague Protocol (1955).[23]

1971. Fifteen years later, the Guatemala City Protocol (1971)[24] (which was rejected by the United States and never has entered into force), included an amendment to Article 17 that would have imposed liability on the carrier for an "event" rather than for an "accident." *See ICAO, Documents of the International Conference on Air Law, Guatemala City*, ICAO Doc. 9040-LC/167-2 at 189 (1972); *see Saks*, 470 U.S. at 403-04. This switch would have created a system of absolute liability (subject to a modest and unbreakable liability limit), but included a specific exception in Article 17: "*However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.*" Guatemala City Protocol, Article IV (amending Article 17) (emphasis added); *see also Saks*, 470 U.S. at 403. Thus, even under

[22] In fact, the Belgian Delegate reversed his position and advocated retention of the narrower term "accident." *See* ICAO Legal Committee, *Minutes of the Ninth Session, Rio de Janeiro, 25 August–12 September 1953*, ICAO Doc. 7450-LC/136-1 at 71 (1954).

[23] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1929, 478 U.N.T.S. 371, ICAO Doc. 7686-LC/140 (signed at The Hague, 28 September 1955 and entered into force 1 August 1963).

[24] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, ICAO Doc. No. 8932 (signed at Guatemala City, 8 March 1971) (not in force).

the Guatemala City Protocol's broad expansion of Article 17, the drafters were careful to carve out an exception for injuries arising from the state of a passenger's health.

1999. That the anomalous use of "event" in the Guatemala City Protocol of 1971 will never enter into force was assured by ICAO's recent adoption of the Montreal Convention of 1999,[25] which is intended to modernize and consolidate the Warsaw system of liability.[26] The term "accident" as used in the Warsaw Convention of 1929 has been retained in Article 17 of the Montreal Convention.[27]

Despite this long history confirming that Article 17 was neither originally intended, nor subsequently expanded, to include liability for injuries resulting from the state of a passenger's health, the decision of the court below achieved precisely this result by engrafting onto Article 17 state law-based concepts of negligence. The fundamental principles set forth in the Warsaw Convention and by the Court in *Tseng* and *Saks* require that the decision of the court below be reversed.

[25] Convention for the Unification of Certain Rules for Carriage by Air, opened for signature on 28 May 1999, DCW Doc. No. 57 (ICAO) (not in force).

[26] While not yet in force, the Montreal Convention has been transmitted to the U.S. Senate for advice and consent to ratification. *Message for the President of the United States Transmitting The Montreal Convention*, Treaty Doc. 106-45 (Sept. 6, 2000).

[27] Article 17.1 of the Montreal Convention provides:

> The carrier is liable for damage sustained in the case of the death or bodily injury of a passenger upon condition only that the accident which caused the death or bodily injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Ninth Circuit should be reversed in all respects.

Dated: July 11, 2003

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THE CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR ("WARSAW CONVENTION")

49 Stat. 3000, T.S. No 876 (1934) (*reprinted* in note following 49 U.S.C.A. § 40105 (1997)
(Translation)

The President of the German Reich, the Federal President of the Republic of Austria, His Majesty the King of the Belgians, the President of the United States of Brazil, His Majesty the King of the Bulgarians, the President of the Nationalist Government of China, His Majesty the King of Denmark and Iceland, His Majesty the King of Egypt, His Majesty the King of Spain, the Chief of State of the Republic of Estonia, the President of the Republic of Finland, the President of the French Republic, His Majesty the King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India, the President of the Hellenic Republic, His Most Serene Highness the Regent of the Kingdom of Hungary, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Republic of Latvia, Her Royal Highness the Grand Duchess of Luxemburg, the President of the United Mexican States, His Majesty the King of Norway, Her Majesty the Queen of the Netherlands, the President of the Republic of Poland, His Majesty the King of Rumania, His Majesty the King of Sweden, the Swiss Federal Council, the President of the Czechoslovak Republic, the Central Executive Committee of the Union of Soviet Socialist Republics, the President of the United States of Venezuela, His Majesty the King of Yugoslavia:

Having recognized the advantage of regulating in a uniform manner the conditions of international trans-

portation by air in respect of the documents used for such transportation and of the liability of the carrier,

Have nominated to this end their respective Plenipotentiaries, who being thereto duly authorized, have concluded and signed the following convention:

CHAPTER I. SCOPE—DEFINITIONS

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purpose of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation,

whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

Article 2

(1) This convention shall apply to transportation performed by the state or by legal entities constituted under public law provided it falls within the conditions laid down in article 1.

(2) This convention shall not apply to transportation performed under the terms of any international postal convention.

CHAPTER II. TRANSPORTATION DOCUMENTS

SECTION I.—PASSENGER TICKET

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

SECTION II.—BAGGAGE CHECK

Article 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The name and address of the carrier or carriers;

(d) The number of the passenger ticket;

(e) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(f) The number and weight of the packages;

(g) The amount of the value declared in accordance with article 22(2);

(h) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

SECTION III.—AIR WAYBILL

Article 5

(1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air waybill": every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity, or loss of this document shall not affect the existence or the validity of the contract of transportation which shall, subject to the provisions of article 9, be none the less governed by the rules of this convention.

Article 6

(1) The air waybill shall be made out by the consignor in three original parts and be handed over with the goods.

(2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the

goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

(3) The carrier shall sign on acceptance of the goods.

(4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

(5) If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 7

The carrier of goods has the right to require the consignor to make out separate waybills when there is more than one package.

Article 8

The air waybill shall contain the following particulars:

(a) The place and date of its execution;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the consignor;

(e) The name and address of the first carrier;

(f) The name and address of the consignee, if the case so requires;

(g) The nature of the goods;

(h) The number of packages, the method of packing, and the particular marks or numbers upon them;

(i) The weight, the quantity, the volume, or dimensions of the goods;

(j) The apparent condition of the goods and of the packing;

(k) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(l) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(m) The amount of the value declared in accordance with article 22(2);

(n) The number of parts of the air waybill;

(o) The documents handed to the carrier to accompany the air waybill;

(p) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(q) A statement that the transportation is subject to the rules relating to liability established by this convention.

Article 9

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

Article 10

(1) The consignor shall be responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air waybill.

(2) The consignor shall be liable for all damages suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

Article 11

(1) The air waybill shall be *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of transportation.

(2) The statements in the air waybill relating to the weight, dimensions, and packing of the goods, as well as those relating to the number of packages, shall be *prima facie* evidence of the facts stated; those relating to the quantity, volume, and condition of the goods shall not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods.

Article 12

(1) Subject to his liability to carry out all his obligations under the contract of transportation, the consignor shall have the right to dispose of the goods by withdrawing them at the airport of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination, or in the course of the journey to a person other than the consignee named in the air waybill, or by requiring them to be returned to the airport of departure. He must not exercise this right of disposition

in such a way as to prejudice the carrier or other consignors, and he must repay any expenses occasioned by the exercise of this right.

(2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air waybill delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill.

(4) The right conferred on the consignor shall cease at the moment when that of the consignee begins in accordance with article 13, below. Nevertheless, if the consignee declines to accept the waybill or the goods, or if he cannot be communicated with, the consignor shall resume his right of disposition.

Article 13

(1) Except in the circumstances set out in the preceding article, the consignee shall be entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air waybill and to deliver the goods to him, on payment of the charges due and on complying with the conditions of transportation set out in the air waybill.

(2) Unless it is otherwise agreed, it shall be the duty of the carrier to give notice to the consignee as soon as the goods arrive.

(3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee shall be entitled to put into force against the

carrier the rights which flow from the contract of transportation

Article 14

The consignor and the consignee can respectively enforce all the rights given them by articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

Article 15

(1) Articles 12, 13, and 14 shall not affect either the relations of the consignor and the consignee with each other or the relations of third parties whose rights are derived either from the consignor or from the consignee.

(2) The provisions of articles 12, 13, and 14 can only be varied by express provision in the air waybill.

Article 16

(1) The consignor must furnish such information and attach to the air waybill such documents as are necessary to meet the formalities of customs, octroi, or police before the goods can be delivered to the consignee. The consignor shall be liable to the carrier for any damage occasioned by the absence, insufficiency, or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.

(2) The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

CHAPTER III. LIABILITY OF THE CARRIER

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65 1/2 milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 23

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

Article 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prej-

udice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Article 26

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this convention against those legally representing his estate.

Article 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

Article 29

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

Article 30

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each

carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

CHAPTER IV. PROVISIONS RELATING TO COMBINED TRANSPORTATION

Article 31

(1) In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of article 1.

(2) Nothing in this convention shall prevent the parties in the case of combined transportation from inserting in the document of air transportation conditions relating to

other modes of transportation, provided that the provisions of this convention are observed as regards the transportation by air.

CHAPTER V. GENERAL AND FINAL PROVISIONS

Article 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of article 28.

Article 33

Nothing contained in this convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this convention.

Article 34

This convention shall not apply to international transportation by air performed by way of experimental trial by air navigation enterprises with the view to the establishment of regular lines of air navigation, nor shall it apply to transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business.

Article 35

The expression "days" when used in this convention means current days, not working days.

Article 36

This convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

Article 37

(1) This convention shall be ratified. The instruments of ratification shall be deposited in the archives of the Ministry for Foreign Affairs of Poland, which shall give notice of the deposit to the Government of each of the High Contracting Parties.

(2) As soon as this convention shall have been ratified by five of the High Contracting Parties it shall come into force as between them on the ninetieth day after the deposit of the fifth ratification. Thereafter it shall come into force between the High Contracting Parties which shall have ratified and the High Contracting Party which deposits its instrument of ratification on the ninetieth day after the deposit.

(3) It shall be the duty of the Government of the Republic of Poland to notify the Government of each of the High Contracting Parties of the date on which this convention comes into force as well as the date of the deposit of each ratification.

Article 38

(1) This convention shall, after it has come into force, remain open for adherence by any state.

(2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.

(3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

Article 39

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Article 40

(1) Any High Contracting Party may, at the time of signature or of deposit of ratification or of adherence, declare that the acceptance which it gives to this convention does not apply to all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or its authority, or any other territory under its suzerainty.

(2) Accordingly any High Contracting Party may subsequently adhere separately in the name of all or any of its colonies, protectorates, territories under mandate, or

any other territory subject to its sovereignty or to its authority or any other territory under its suzerainty which have been thus excluded by its original declaration.

(3) Any High Contracting Party may denounce this convention, in accordance with its provisions, separately or for all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority, or any other territory under its suzerainty.

Article 41

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this convention to call for the assembling of a new international conference in order to consider any improvements which may be made in this convention. To this end it will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such conference.

This convention, done at Warsaw on October 12, 1929, shall remain open for signature until January 31, 1930.

ADDITIONAL PROTOCOL

With Reference to Article 2

The High Contracting Parties reserve to themselves the right to declare at the time of ratification or of adherence that the first paragraph of article 2 of this convention shall not apply to international transportation by air performed directly by the state, its colonies, protectorates, or mandated territories, or by any other territory under its sovereignty, suzerainty, or authority.

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No. 02-1348

IN THE

Supreme Court of the United States

OLYMPIC AIRWAYS,
Petitioner,

v.

RUBINA HUSAIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the repeated insistence by an airline flight attendant that an asthmatic passenger remain in an assigned seat amidst life-threatening smoke—in direct violation of standard industry practice and the policy of her own airline—is an "unusual" occurrence and thus, under the principles established in *Air France v. Saks*, 470 U.S. 392 (1985), constitutes an "accident" for purposes of Article 17 of the Warsaw Convention.

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IN THE

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No. 02-1348

OLYMPIC AIRWAYS,
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RUBINA HUSAIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF FOR RESPONDENTS

STATEMENT

Dr. Abid Hanson died on January 4, 1998, as a result of prolonged exposure to cigarette smoke on an Olympic Airways international flight. During that flight, an Olympic flight attendant—disregarding both industry practice and the policy of her own airline—insisted that Dr. Hanson remain in his assigned seat near to the hazardous smoke, despite three separate, increasingly urgent requests by Dr. Hanson's wife, respondent Rubina Husain, that he be moved to a seat away from the smoke and despite the availability of empty seats on the flight. Applying the terms of the Warsaw Convention, the district court found that the events causing Dr. Hanson's death were an "accident" under Article 17 of the Convention and that the actions of the flight crew amounted to willful misconduct. The court awarded respondents economic

damages of $1.4 million and non-economic damages in the same amount, with each award reduced by 50 percent because of negligence by Dr. Hanson. The court of appeals affirmed.

A. The events giving rise to this lawsuit took place on Olympic Airways Flight 417 from Athens, Greece to New York City. The flight was the second leg of a return trip following a family vacation. Prior to the first leg, from Cairo, Eygpt to Athens, Ms. Husain had taken direct steps to assure that her husband, who had suffered from asthma for more than two decades, would be seated in a non-smoking area. Returning to the counter after receiving seat assignments, Ms. Husain showed the check-in agent a letter (from Dr. Hanson's brother, a doctor) stating that Dr. Hanson had a history of asthma and specifically asked the agent to ensure that the family members were assigned seats in the non-smoking section. Pet. App. 37a. The flight from Cairo to Athens passed without incident.

At the Athens airport Dr. Hanson experienced difficulty breathing in several smoke-filled waiting areas. Pet. App. 37a. Then, upon boarding the aircraft for New York, Dr. Hanson and his family found that their assigned seats, while in the non-smoking section, were in row 48, just three rows from the beginning of the smoking section. Pet. App. 37a. Ms. Husain promptly approached an Olympic flight attendant, Maria Leptourgou, saying that her husband could not sit near smoke. Having informed her of the problem, Ms. Husain told the flight attendant, "You have to move him." Pet. App. 38a. Ms. Leptourgou rebuffed this effort, directing Ms. Husain to "have a seat." Pet. App. 38a.

This request by Ms. Husain was the first of three unsuccessful efforts to have Dr. Hanson moved to a seat away from the smoking area. The second occurred before takeoff, when Ms. Husain told Ms. Leptourgou that her husband was "allergic to smoke" and "adamant[ly]" sought his assignment to a different, safer seat. Pet. App. 38a. Ms. Husain again

was told that Dr. Hanson could not be moved. This time Ms. Leptourgou informed Ms. Husain that she was busy and that she could not relocate Dr. Hanson because the plane was "totally full." Pet. App. 38a.

The latter statement turned out to be untrue. As evidence later showed, the plane had 422 passenger seats (not counting four seats designated as crew seats) and only 411 passengers. Pet. App. 40a. There were thus 11 empty seats. Furthermore, the flight had 28 non-revenue passengers, a class of passengers that includes Olympic employees and their relatives, as well as employees and their relatives from other airlines. Pet. App. 40a.

After the flight took off and the "no-smoking" sign was extinguished, passengers in the smoking section began to smoke. Pet. App. 39a. To make matters worse, passengers assigned to non-smoking seats went back to the smoking section and began to smoke while standing in the aisles. Pet. App. 39a. As the smoke increased, it drifted forward to the row in which Dr. Hanson and his family were sitting. Dr. Hanson complained to his wife that the smoke was "like a chimney." Pet. App. 39a.

Ms. Husain tried again, now for the third time, to get the flight crew to move Dr. Hanson. Addressing Ms. Leptourgou, Ms. Husain said, "You have to move my husband from here." Pet. App. 39a. Ms. Leptourgou "curtly" refused to do so, repeating her (false) assertion that the plane was full. Pet. App. 39a. The flight attendant did say that Ms. Husain herself could seek out a different seat, but declined to offer any assistance. Ms. Husain then told Ms. Leptourgou that her husband had to move, even if that meant a change to a seat outside the economy cabin. Pet. App. 40a; *see also* Pet. App. 68a ("According to her testimony, Ms. Husain literally *begged* Ms. Leptourgou to move her husband. She told the flight attendant, 'I don't care if the plane is full. Sit him on

the carpet, sit him in first class, but don't sit him here.'") This last, even more desperate, request likewise went unheeded.

The refusal by Ms. Leptourgou to move Dr. Hanson away from hazardous smoke was anything but normal flight crew behavior. Diana Fairechild, an experienced flight attendant and longtime international purser, testified that, under the recognized standard of care in the airline industry, Ms. Leptourgou "should have absolutely responded" to the requests for a seat away from the smoke. Pet. App. 53a. Ms. Fairechild stated: "I've never seen anybody treated like this on an international flight, so it's not—it's not airline service as far as I experienced or I would expect." Pet. App. 71a. Indeed, an Olympic flight attendant testified that the refusal to move Dr. Hanson was contrary to Olympic Airways' own policy, which is to move ill passengers when doing so will assist in their recovery. Pet. App. 53a.

The continued exposure of Dr. Hanson to the surrounding smoke ultimately had tragic consequences. As the smoke persisted during the first few hours of the flight, and then intensified following service of a meal, Dr. Hanson experienced more and more trouble with his breathing. Pet. App. 41a. Dr. Hanson used up one inhaler and asked his wife for a second one, which she retrieved for him. Pet. App. 41a. At several points he looked behind him to see the accumulation of smoke. Pet. App. 41a.

Finally, Dr. Hanson told his daughter that the smoke was bothering his allergies and that he was going to move forward in the cabin in search of fresher air. Pet. App. 41a. Doing so, he reached the galley area between rows 19 and 20. There, he asked his wife to administer a shot of epinepherine, which he carried in an emergency medical kit. Pet. App. 41a. Ms. Husain gave Dr. Hanson the shot, and then went back to the rear of the cabin to get Dr. Umesh Sabharwal, an allergist and family friend who had been traveling with them.

When Dr. Sabharwal reached Dr. Hanson, he found that he was in respiratory distress. Pet. App. 42a. From that point on, Dr. Sabharwal and Ms. Husain used a combination of CPR, medication, and oxygen in an attempt to restore his breathing. Pet. App. 42a-43a. None of the efforts was successful. Dr. Hanson died aboard the flight.

B. Respondents filed suit against Olympic, asserting claims under the Warsaw Convention. *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), 137 L.N.T.S. 11, *reprinted in note following* 49 U.S.C. § 40105 ("Convention").[1] Article 17 of the Convention provides that, subject to possible defenses, an international air carrier "shall be liable for damage sustained in the event of the death . . . of a passenger . . . if the accident which caused the damage so sustained took place on board the aircraft . . . ."

After a several-day trial, the district court found Olympic liable for Dr. Hanson's death on Flight 417. In so doing, the court rejected Olympic's argument that the events leading to Dr. Hanson's death were not an "accident" within the meaning of Article 17. The court first noted that this Court had defined an "accident" as "an unexpected or unusual event or happening that is external to the passenger." Pet. App. 49a (quoting *Air France v. Saks*, 470 U.S. 392, 405 (1985)). The court then found that the repeated refusals to move Dr. Hanson away from the dangerous smoke met that test.

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[1] Respondents originally filed suit in California state court. Olympic removed the action to federal court, 28 U.S.C. §1441, basing federal jurisdiction on the Foreign Sovereign Immunities Act, 28 U.S.C. §1330, and the existence of a federal question, 28 U.S.C. §1331. The district court found subject matter jurisdiction under the Foreign Sovereign Immunities Act. *See* Pet. App. 33a n.1.

The district court identified several grounds for concluding that "Ms. Leptourgou [the Olympic flight attendant] acted in an unexpected and unusual manner. . . ." Pet. App. 52a. To begin with, the court observed, "the recognized standard of care for flight attendants during international air travel demands that a flight attendant make efforts to accommodate a passenger who indicates that he or she needs to be moved for medical reasons." Pet. App. 52a. As a result, Ms. Leptourgou acted outside the scope of normal operations when she refused to relocate Dr. Hanson to an unoccupied seat or to arrange an exchange of seats with a non-revenue passenger. Furthermore, in insisting that Dr. Hanson remain in a hazardous location, Ms. Leptourgou "violated Olympic Airways' policy," which required her to find a less dangerous seat. Pet. App. 53a. At the very least, the court found, the flight attendant should have "alert[ed] the chief cabin attendant . . . of Ms. Husain's medical requests." Pet. App. 54a. Her "blatant disregard of industry standards and airline policies" was enough to constitute an "accident" for purposes of Article 17. Pet. App. 58a.

The district court then found, as Article 17 further requires, that the abnormal conduct of the crew "caused Dr. Hanson's death." Pet. App. 59a. Although Olympic had contended that Dr. Hanson died as a consequence of certain food allergies, the court decided otherwise, stating that "Dr. Hanson's death was caused, at least in significant part, by smoke inhalation which triggered a severe asthmatic reaction." Pet. App. 59a. Again noting the availability of empty seats and seats occupied by non-revenue passengers, the court concluded: "If Ms. Leptourgou had moved Dr. Hanson out of the vicinity of the smoking section, he would not have died aboard Flight 417." Pet. App. 60a.

Finally, the district court found that the continued refusal to help Dr. Hanson amounted to "willful misconduct" under

Article 25 of the Convention.[2] Although it declared that "[t]he plaintiff bears a 'heavy burden' in proving willful misconduct," Pet. App. 66a, the court determined that "at the time of her third refusal to assist Dr. Hanson, Ms. Leptourgou *must have known* that the cabin was not full, that Dr. Hanson had a medical problem and a special susceptibility to smoke, and that her failure to move him would aggravate his condition and cause him probable injury." Pet. App. 67a. In reaching this conclusion, the court found that "Ms. Leptourgou was aware of the industry standard of care," Pet. App. 67a, as well as "Olympic's specific policy requiring that a flight attendant inform [the chief attendant] when a passenger requests a seat transfer for medical reasons." Pet. App. 67a. And, observing that "each of Ms. Husain's requests was more emphatic and desperate than the last," Pet. App. 68a, the court found "that Ms. Husain communicated her husband's problem to the flight attendant so emphatically that Ms. Leptourgou must have recognized the danger." Pet. App. 68a.[3]

C. The court of appeals affirmed. Like the district court, the court of appeals recognized that, to meet the standard of Article 17, respondents had to demonstrate that Dr. Hanson's death was caused by "'an unexpected or unusual event or

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[2] Article 25 of the Convention provides that a carrier may not "avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as . . . is considered to be equivalent to wilful misconduct." In particular, a carrier found to have engaged in willful misconduct cannot invoke the liability caps set forth in Article 22. (Like the courts below, we use the modern spelling of "willful" except when directly quoting Article 25.)

[3] The district court awarded economic and non-economic damages in the amount of $1.4 million apiece. It then reduced each award by 50 percent, pursuant to Article 21, because of negligence by Dr. Hanson in failing to seek out a different seat on his own, after Ms. Leptourgou gave him that option. *See* Pet. App. 74a-75a.

happening that is external to the passenger.'" Pet. App. 10a (quoting *Saks*, 470 U.S. at 405). In holding that respondents had satisfied that requirement, the court of appeals relied heavily on the finding, made by the district court "after examining evidence establishing industry standards and Olympic's policies regarding passengers with medical needs, that this failure to act [*i.e.*, to respond to the requests to move Dr. Hanson] was a 'blatant disregard of industry standards and airline policies.'" Pet. App. 14a. Applying the *Saks* standard, the Ninth Circuit concluded that "[the flight attendant's] conduct was clearly external to Dr. Hanson, and it was unexpected and unusual in light of industry standards, Olympic policy, and the simple nature of Dr. Hanson's requested accommodation." Pet. App. 14a.[4]

The court of appeals then upheld the findings that the conduct of the crew caused Dr. Hanson's death and that the behavior was sufficiently serious to amount to willful misconduct. With respect to the former, while saying that the question was a "close call," Pet. App. 17a, the court noted that "the district court, as the trier of fact, was in the best position to determine which of two plausible explanations [for the cause of death] was correct." Pet. App. 17a. With respect to the latter, the court relied on facts establishing "that Ms. Leptourgou was aware that Dr. Hanson was in a desperate situation that required immediate assistance, yet despite this knowledge and increasingly emphatic pleas from Ms. Husain, Ms. Leptourgou ignored Olympic's policy and industry standards and refused to assist Dr. Hanson." Pet. App. 21a. The court concluded: "This amounts to a dereliction of duty that is not only unusual and unexpected on an international flight, but willful." Pet. App. 21a.

[4] The Ninth Circuit added: "The failure to act in the face of a known, serious risk satisfies the meaning of 'accident' within Article 17 so long as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane." Pet. App. 14a. We discuss this additional language at pages 26-27 *infra*.

SUMMARY OF ARGUMENT

Article 17 of the Warsaw Convention provides that, subject to certain defenses, an international air carrier "shall be liable" for the death or bodily injury of a passenger if an "accident" caused the death or injury. The events in this case—repeated refusals by a flight attendant to move an asthmatic passenger away from hazardous cigarette smoke, in disregard of usual industry practice and company policy—were an "accident" within the recognized meaning of that standard.

I. The term "accident," in common usage, is understood to refer to "[a]n unexpected, undesirable event" or "[a]n unforeseen incident." *The American Heritage Dictionary of the English Language* at 11 (3d ed. 1992). The same broad meaning applies in a legal context as well. *See, e.g., Cozzie v. Metropolitan Life Ins. Co.*, 140 F.3d 1104, 1109 (7th Cir. 1998). As this Court has observed, "'[s]peaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss.'" *Air France v. Saks*, 470 U.S. 392, 398 (1985) (quoting *Fenton v. J. Thorley & Co.*, [1903] A.C. 443, 453).

Taken at face value, therefore, the term "accident" has a broad, inclusive meaning. Textual indications in the Convention further support that meaning here. Thus, Article 17 is not limited to particular aviation accidents like aircraft crashes or explosions, but expansively includes accidents that take place "on board the aircraft" and accidents that occur "in the course of any of the operations of embarking or disembarking." Not only does this language reach the kinds of incidental accidents that cause injury to individual passengers, but it naturally connects presumptive liability for

accidents to the time that the airlines exert control over their passengers. Moreover, Article 17 reaches accidents that involve willful misconduct, not just accidents that involve inadvertence. The term "accident" thus appears to encompass, at the very least, a wide range of unusual occurrences with respect to physical operation of the aircraft and the conduct of airline personnel.

Not surprisingly, therefore, this Court has given the term "accident" a full, comprehensive definition. *See Saks*, 470 U.S. at 405-06. Although the Court imposed one necessary limitation—recognizing that, under the wording of Article 17, the "accident" and the resulting death or injury could not be one and the same—it otherwise adopted the common meaning for the term, defining it to mean "an unexpected or unusual event or happening that is external to the passenger." *Saks*, 470 U.S. at 405. It thus foreclosed liability at the Article 17 stage only when a death or injury "indisputably results from the passenger's own internal reaction to the *usual, normal, and expected operation of the aircraft.*" *Id.* at 406 (emphasis added). Furthermore, the Court stressed that its "definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries," *id.* at 405—an admonition that it has since repeated, *see El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 165 n.9, 172 (1999)—and declared that "the passenger [need only] be able to prove that some link in the chain [of causation] was an unusual or unexpected event external to the passenger." *Saks*, 470 U.S. at 406.

The definition of "accident" adopted in *Saks* fits closely with the general liability system established by the Convention. That system, as originally constructed, was based upon principles of fault. *See* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-501 (1967). Given the careful interplay between establishing presumptive liability for "accidents" and allowing carriers to avoid that liability only upon a showing of due care, it is unlikely that the signatories to the Convention intended to relieve carriers of liability for deaths or injuries directly caused by their own misconduct, let alone by their willful misconduct. That result would be all the more improbable given the fact that passengers can obtain recovery under the Convention or not at all. *See Tseng*, 525 U.S. at 167-76.

II. The events on board Olympic Flight 417 were very different from the "usual, normal, and expected operation of the aircraft." *Saks*, 470 U.S. at 406. By refusing to move Dr. Hanson to a less dangerous location, the Olympic flight attendant not only departed from the usual practice in the airline industry, but also ignored the policy of her own airline. As a result, she needlessly confined Dr. Hanson to a smoke-surrounded area where he increasingly could not breathe. That behavior was a direct, material link in the chain of causation that caused Dr. Hanson's death. *See Saks*, 470 U.S. at 406.

The refusal of a flight crew to adhere to its usual practices is a prime example of an "unusual" occurrence: by definition, it is unusual for employees of an airline to decline to do what they usually do. While Olympic argues that an omission, as opposed to an affirmative act, is never an "accident," that theory makes little sense in this context. Even if acts and omissions can be reliably distinguished—a doubtful proposition to begin with—the fact remains that it is "unusual" for a flight crew *either* to do something that it does not normally do *or* to fail to do something that it normally does. And, while tort law may relieve persons of a duty to act in certain circumstances, *Prosser and Keeton on The Law of Torts* § 56, at 375 (5th ed. 1984), that principle generally does not extend to circumstances in which one party exerts custody or control over another. *See id.* at 376-77. That is precisely the situation that exists between airline carriers and their passengers:

as part of air travel, passengers are expected to follow the directions of airline personnel, including directions about where they are to sit.

Treating a departure from industry standards as an "accident" does not, as Olympic contends, import the "due care" defense of Article 20(1) into Article 17. This Court has long recognized that proof of a departure from custom is not the same as proof of negligence. *See Texas & Pacific Ry. Co. v. Behymer*, 189 U.S. 468, 470 (1903) ("What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not"); *see also Prosser and Keeton* § 33, at 195. Thus, while the Article 17 inquiry (whether an "accident" occurred) will often be similar to the Article 20(1) inquiry (whether a carrier has exercised "due care")—a point that this Court specifically acknowledged in *Saks*, *see* 470 U.S. at 407—they ultimately ask separate questions and look for separate answers. All that the Article 17 inquiry calls for is evidence that something unusual happened with respect to the flight, a requirement that is readily met by proof that the flight crew deviated from well-accepted practices in the industry.

None of this is altered by the fact that Dr. Hanson had a pre-existing medical condition. Although language in *Saks* bars recovery for an injury resulting from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft," 470 U.S. at 406, that language, on its face, does *not* bar recovery for an injury where operation of the aircraft was decidedly abnormal. A pre-existing condition may, of course, affect the factual determination about what *caused* a particular death or injury, making it more likely that the cause was not the "accident" in question. But that contested issue was resolved against Olympic in the courts below.

III. The fact that the Convention provides the only remedy for death or injury may properly be considered in determining whether the signatories intended to give a narrow meaning to the term "accident." In interpreting a treaty, this Court seeks to construe its language in a manner that fits with the objectives of the treaty as a whole. *See Saks*, 470 U.S. at 399. Here, it is difficult to think that the signatories to the Convention meant to bring about a result that would both relieve Olympic of liability for its willful misconduct and leave Ms. Husain without any remedy for her husband's death, all as part of a liability scheme that is generally intended to provide at least some relief for passengers harmed by the fault of a carrier. And it seems particularly doubtful that they would have done so, not by making that point directly, but by depending on an artificially narrow construction of the term "accident."

The post-Convention history cited by Olympic offers no evidence of any such understanding. For the most part, it shows only that the term "accident" is narrower than the terms "event" or "occurrence," a point that this Court already settled in *Saks*. More broadly, however, the post-ratification materials work against the position now advocated by Olympic, revealing a strong trend towards increasing liability even when a carrier is not at fault. The attempt by Olympic to avoid liability for its own misconduct, therefore, is not only contrary to any reasonable reading of the term "accident," it is at odds with the course of post-ratification history as well.

ARGUMENT

It is beyond dispute, at this point, that willful misconduct by the flight crew on Olympic Flight 417 caused the death of Dr. Hanson in the most direct sense: that is, absent the willful misconduct, Dr. Hanson would not have died on that flight. The question, then, is whether the Warsaw Convention makes Olympic liable for that misconduct. Olympic claims that it

does not, arguing that Article 17 of the Convention—which establishes that a carrier is presumptively liable for the death of a passenger if an "accident" caused the death—operates to shield international carriers from liability for certain deaths caused by a failure to act. While acknowledging that this Court has defined the term "accident" to mean "an unexpected or unusual event or happening that is external to the passenger," *Air France v. Saks*, 470 U.S. 392, 405 (1985) (*Saks*), Olympic says that a failure to take action, as opposed to the taking of affirmative action, can never itself be an unexpected or unusual happening or event. According to Olympic, any other reading of Article 17 would improperly import the concept of "lack of due care" into Article 17 where it does not belong.

This argument is wrong on several counts. To begin with, it is directly at odds with the accepted meaning of the word "accident," both as it is typically understood and as it has been construed by this Court. That meaning establishes that an "accident," unless specifically limited by context, is nothing more or less than an occurrence that is abnormal or unexpected. *See Saks*, 470 U.S. at 405. As applied to air travel, therefore, an "accident" is something other than the "usual, normal and expected operation of the aircraft." *Saks*, 470 U.S. at 406. That definition is plainly broad enough to encompass the exposure of a passenger to dangerous conditions as a result of repeated refusals by a flight attendant to follow the regular industry and company practice. By its own terms, the departure by a flight crew from its usual procedures is an unusual event.

Furthermore, this natural application of the term "accident" does not turn on whether the departure from common industry practice is characterized as an affirmative act or as a refusal to act. Even if a coherent distinction can be made between the two categories, the fact remains that a failure to follow a usual course of action can be just as unexpected as

the pursuit of an unusual course. And Olympic is simply incorrect that the inquiry with regard to this kind of "accident" (that an airline did not follow usual custom) is the same as an inquiry with regard to negligence (that the airline acted without reasonable prudence). Although the inquiries are similar, *see Saks*, 470 U.S. at 407, it has long been recognized that they are not identical. *See, e.g., Texas & Pacific Ry. Co. v. Behymer*, 189 U.S. 468, 470 (1903) (Holmes, J.). The judgment below thus was correct, and it should be affirmed.

I. THE TERM "ACCIDENT" IN ARTICLE 17 ENCOMPASSES UNUSUAL ACTS OR OMISSIONS BY A FLIGHT CREW THAT ARE NOT PART OF THE NORMAL OPERATION OF THE AIRCRAFT

A. The basic question in this case is whether the term "accident" in Article 17 of the Warsaw Convention encompasses circumstances in which the refusal of a flight crew to observe standard industry practice directly caused the death of a passenger on an international flight. To answer that question, it is necessary to look first at the meaning of the term "accident" itself. This Court has said that courts interpreting a treaty "'may look beyond the written words [of the treaty], to the history of the treaty, the negotiations, and the practical construction adopted by the parties,'" *Saks*, 470 U.S. at 397 (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943)), but it has made clear that "[t]he analysis must begin . . . with the text of the treaty and the context in which the written words are used." *Saks*, 470 U.S. at 396-97; *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699-700 (1988); *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482

U.S. 522, 534 (1987). The starting point is thus the language of the treaty. *See United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992).[5]

The critical term here—the word "accident"—has, in common usage, a broad, naturally inclusive meaning. The American Heritage Dictionary, for example, defines "accident" as "[a]n unexpected, undesirable event" or as "[a]n unforeseen incident." *The American Heritage Dictionary of the English Language* at 11 (3d ed. 1992). Other dictionary definitions are to the same effect. *See, e.g., Webster's New World College Dictionary* at 8 (4th ed. 1999) ("a happening that is not expected, foreseen, or intended"); *Webster's New International Dictionary of the English Language* at 15 (2d ed. 1942) ("[a]n event that takes place without one's foresight or expectation"). Furthermore, in ordinary speech, an "unexpected" happening can be either an act or omission or the result of that act or omission. For example, if a cook forgets to turn off a cooking flame, causing a grease fire and then a burned arm, all of the events in that chain of cause and effect—the failure to turn off the flame, the resulting grease fire, and the burned arm—may properly be described as "accidents."

The same broad meaning attaches to the word "accident" in a legal context as well. *See, e.g., Cozzie v. Metropolitan Life Ins. Co.*, 140 F.3d 1104, 1109 (7th Cir. 1998) ("the term 'accident' is not easily susceptible to a limiting principle"). This Court has noted that "'[s]peaking generally, but with reference to legal liabilities, an accident means *any* unin-

[5] The official language of the Warsaw Convention is French, and this Court has said that, in order to identify the shared expectations of the signatories, it is necessary to look to the "French legal meaning" of particular terms. *See Saks*, 470 U.S. at 399. With respect to the term at issue here, however, the Court has observed that "the French legal meaning of the term 'accident' differs little from the meaning of the term in Great Britain, Germany, or the United States." *Id.*

tended and unexpected occurrence which produces hurt or loss.'" *Saks*, 470 U.S. at 398 (quoting *Fenton v. J. Thorley & Co.*, [1903] A.C. 443, 453) (emphasis added). Indeed, Lord Lindley in *Fenton* specifically emphasized that the word could be employed in a number of different contexts, pointing out that it is "often used to denote both the cause and the effect, no attempt being made to discriminate between them." *See Saks*, 470 U.S. at 398 (quoting [1903] A.C. at 453); *Wickman v. Northwestern Nat'l Ins. Co.*, 908 F.2d 1077, 1086 (1st Cir.), *cert. denied*, 498 U.S. 1013 (1990) ("In recent years, courts consistently have rejected the distinction between accidental means and accidental results . . . ."). *See generally Connelly v. Hunt Furniture Co.*, 240 N.Y. 83, 85-89 (1925) (Cardozo, J.) A law dictionary definition, similarly, is far-ranging and inclusive. *See Black's Law Dictionary* at 14 (5th ed. 1979).

Viewed by itself, therefore, the term "accident" would naturally apply to a broad range of "unexpected" or "unforeseen" occurrences. And, with one exception discussed below (*see* page 19 *infra*), that reading is reinforced by other textual indications in the Convention. Thus, for example, while the drafters and signatories of the Convention might have limited the term to specific kinds of unusual aviation events like airline crashes or mid-flight explosions, the language of Article 17 makes clear that they did not do so. By its terms, Article 17 expansively covers accidents that take place "on board the aircraft" and accidents that take place "in the course of any of the operations of embarking or disembarking." This extended reach is significant for several reasons. First, it indicates that the drafters and signatories had in mind those unusual events that take place during the time that airlines exert control over their passengers, reflecting the familiar concept that control and responsibility are interconnected. Second, it brings within the Convention the class of more common "accidents"—often involving airline personnel—

that result in injury to individual passengers, rather than limiting its scope to large-scale incidents affecting passengers on the plane as a whole.

The intended breadth of the term "accident" is also evident from what it does not exclude: intentional misconduct. While "accidents" are sometimes distinguished from acts done "on purpose," *see, e.g., Massachusetts Bay Ins. Co. v. Vic Koenig Leasing, Inc.*, 136 F.3d 1116, 1124 (7th Cir. 1998), it is clear that the use of the term in Article 17 refers to both kinds of unusual happenings. That is because the Convention unmistakably imposes liability (in fact, uncapped liability) for willful misconduct, *see* Convention Art. 25, and there can be no liability at all under the Convention in the absence of an "accident." For purposes of the Convention, therefore, the deliberate striking of a passenger by a flight crew member is regarded as an "accident."

These contextual cues, at the very least, support the notion that the term "accident" broadly includes unusual happenings with regard to operation of the aircraft or the conduct of airline personnel. And, that reading is entirely consistent with the fact that Article 17 uses the term "accident," whereas Article 18, which deals with damage to baggage, uses the different term "occurrence." While the contrast naturally suggests that the two words were intended to have different meanings, that difference is already provided by the accepted usage of "accident" as an *unusual* occurrence. Nothing in the comparison between those terms restricts the types of unusual occurrences that may be considered "accidents" under Article 17.[6]

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[6] Although the drafting history of Article 17 shows that the drafters adopted the term "accident" in place of "occurrence"—as part of a process of breaking up a single Article into several Articles governing passengers, baggage, and delays—the history is equivocal about the reasons for doing so. Thus, while the President of the drafting committee made remarks implying that the changes were more than merely cosmetic, *see Saks*, 470 U.S. at 403, he went on to cast some doubt on that reading, saying: "I add right away that we are still in the same situation; it is not a question of new articles but of a new numbering of the articles." International Conference on Air Law Affecting Air Questions, Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw 206 (R. Horner & D. Legrez trans. 1975). At a minimum, this emphasis on "numbering," rather than on the substance of the articles, suggests that the intended difference between "accident" and "occurrence" was meant to be no greater than the difference between an unusual and an ordinary occurrence.

As we have said, however, there is one textual indication that requires an exception to this fully inclusive meaning. For Article 17 does not speak of an "accident" in the abstract, it speaks of an accident that "cause[s]" a death or bodily injury. Giving both words their natural effect, it necessarily follows that a passenger's death or bodily injury cannot itself be the abnormal occurrence. To have an "accident," therefore, *something else* must be unusual on the flight in question.

This Court made precisely that point in *Saks*. There, the Court undertook to resolve a conflict over whether the term "accident" required an unusual happening apart from the occurrence of a death or injury itself. The Court held that it did. Reviewing the language of the convention, as well as its drafting history and subsequent interpretation, the Court held that "liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger." 470 U.S. at 405. It thus concluded that a passenger could not recover for an injury that "indisputably results from the passenger's own internal reaction to the *usual, normal, and expected operation of the aircraft*." 470 U.S. at 406 (emphasis added).

Although Olympic concedes that the *Saks* standard is controlling here, it seems to take the view that the phrase "an unexpected or unusual event or happening" should itself be

subject to a narrowing construction. But *Saks* indicates just the opposite. Having established the standard, the Court took pains to add that its "definition should be *flexibly applied* after assessment of all the circumstances surrounding a passenger's injuries." 470 U.S. at 405 (emphasis added). Moreover, the Court observed that a simple focus on "fortuitous or unpredictable" events—the inquiry that the Court ultimately found to be appropriate—was "in accord with American decisions which, while interpreting the term 'accident' broadly . . . nevertheless refuse to extend the term to cover routine travel procedures that produce an injury due to the peculiar internal condition of a passenger." 470 U.S. at 404-05. Far from suggesting that the term "accident" should be subject to further limitations, this language appears to signal that the term should be interpreted "broadly," *id.*, albeit not so broadly as to create presumptive liability for injuries arising out of "routine travel procedures."

The Court in *Saks* also made clear that an "accident" may consist of both usual and unusual elements. Recognizing the potential for complex disputes about what is or is not unusual, the Court stressed that "[a]ny injury is the product of a chain of causes, and we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger." 470 U.S. at 406. The relevant "accident" thus need not be the only, or even the last, link in the chain of causation. To satisfy Article 17, it is enough that the unusual occurrence was a contributing factor in the subsequent death or injury.

Finally, the Court in *Saks* explained that there was a difference between the need to demonstrate an unusual occurrence (required by Article 17) and the need to prove negligence (not required by Article 17). *See* 470 U.S. at 407. Although it acknowledged that many airlines had chosen to waive their due care defenses, *see id.*, the Court held that this waiver did not relieve plaintiffs of their Article 17 obligation

to show that something abnormal (other than their injury alone) had happened during the flight. The Court noted that the "accident" requirement and the "due care" defense were "distinct" because the former "is located in a separate article and because it involves an inquiry into the nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury." 470 U.S. at 407. At the same time, however, the Court recognized that "these inquiries may on occasion be similar. . . ." 470 U.S. at 407.

Nothing in the *Saks* analysis, or in the definition that it sets forth, therefore, supports a theory that the term "accident" requires anything more than proof of an unusual occurrence that is outside "the usual, normal, and expected operation of the aircraft." 470 U.S. at 406. That proof may relate to how the carrier operates the physical equipment, or it may relate to how the carrier deals with its passengers. Indeed, just four Terms ago, the Court openly doubted whether the Second Circuit, in a case involving an airline security search, had applied the *Saks* test with sufficient breadth. *See El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 165 n.9 (1999). The Court first noted that the district court had employed a "flexible application" in order to find that "'[a] routine search, applied erroneously to plaintiff in the course of embarking on the aircraft, is fairly accurately characterized as an accident.'" *Id.* (quoting 919 F. Supp. at 158). Then, after reviewing the decision of the Second Circuit to reverse that determination, the Court remarked: "It is questionable whether the Court of Appeals 'flexibly applied' the definition of 'accident' we set forth in *Saks*." 525 U.S. at 165 n.9. Later in the opinion, the Court rebuffed a concern that its holding—that the Convention provides the only avenue of relief for deaths or injuries on international flights—would allow carriers to "escape liability for their intentional torts," pointedly observing: "[W]e have already cautioned that the definition of 'accident' under Article 17 is an 'unusual event

. . . *external to the passenger*,' and that '[t]his definition should be flexibly applied.'" 525 U.S. at 172 (quoting *Saks*, 470 U.S. at 405) (emphasis added in *Tseng*).

The *Saks* decision thus interprets the term "accident" in a manner that fully reflects the express terms and overall structure of the Convention. The Court properly limited the scope of the term to the extent required by its immediate context, but made no further inroads on its customary broad meaning. Furthermore, the Court emphasized that the definition should be "flexibly applied," 470 U.S. at 405, a point that it then reiterated in *Tseng*. Those principles are controlling here.

B. This reading also fits with the nature of the liability system as a whole. The Convention is a fault-based system. *See* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-501 (1967). Given that understanding, it would be highly unnatural to adopt a definition of the term "accident" that, as a practical matter, would allow carriers to escape liability for deaths or injuries caused by their own misconduct. Nothing in the Convention calls for that kind of illogical construction.

There is no serious dispute that the liability system established by the Warsaw Convention is based on principles of fault. *See* Lowenfeld & Mendelsohn, *supra*, at 500 (noting that the Convention "retain[ed] the principle of liability on the basis of negligence"); Weigand, *Accident, Exclusivity, and Passenger Disturbances Under the Warsaw Convention*, 16 Am. U. Intl. L. Rev. 891, 920 (2001) ("the Convention was originally based on fault concepts and set forth a *system* of liability"); *see also* Pet. Br. 15 ("the overall liability system created by the Warsaw Convention is fault based").[7]

[7] For purposes of this discussion, we look primarily at the liability system as it was constructed in 1929, when the term "accident" was made part of Article 17. Although the liability system has changed over the years through a process of amendments and supplemental agreements—primarily in ways that increase the liability of carriers without regard to fault, *see* pages 44-45 *infra*—the signatories to the Convention first used the term "accident" in the context of the original system established by the Convention. *See also* note 17 *infra* (quoting revised Article 17 from 1999 Montreal Convention).

Confronted by a multitude of nations with different liability systems, the drafters of the Convention employed a two-step process of presumption and rebuttal to establish liability. Article 17 embodies the presumption ("[t]he carrier shall be liable . . ."). Thus, to satisfy Article 17, a passenger is required to show only that an "accident . . . caused" the relevant death or bodily injury. Notably, Article 17 does not itself require any showing of fault: it is rather the broad gateway through which passengers' claims, whether fault-based or not, must first pass.

It then falls to the carrier to rebut the presumption of liability if it can. The primary means for doing so, provided by Article 20, is a showing that the carrier was not at fault. *See* Article 20(1) ("[t]he carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures"). But this so-called "due care" defense has an obvious corollary. While Article 20 expressly extinguishes liability upon a showing of proper care, it necessarily *permits* liability for a death or bodily injury if the carrier cannot make that showing.

This carefully-constructed framework makes it highly improbable that the Convention signatories intended, by use of the term "accident," to protect carriers from liability for deaths caused by their misconduct, much less for deaths caused by their willful misconduct. The evident purpose of Article 17 is to bring forward a wide variety of claims for "accidents" involving death and bodily injury, leaving ultimate questions of liability to be resolved under the sub-

stantive standards of Articles 20 (due care), 21 (contributory negligence), and 25 (willful misconduct). While Article 17 does require a plaintiff to show something "unusual" other than the fact of his or her injury, that threshold requirement serves primarily to screen out cases in which there is no possibility of "fault" because nothing out of the ordinary has occurred. It would be very different to use Article 17 to foreclose claims specifically grounded in facts demonstrating that aberrant carrier behavior caused a death or bodily injury during flight.

That result would be stranger still given the fact that passengers have no recourse other than the Convention to obtain relief for a death or injury. *See Tseng*, 525 U.S. at 167-76.[8] Having established an exclusive liability system, it is, at the very least, difficult to see why the signatories would then choose to exonerate carriers for deaths and injuries caused by their fault and almost unimaginable that they would do so solely by a cryptic use of the word "accident" in Article 17. A far more likely explanation, therefore, is that the treaty used the word in its natural, accepted sense—to indicate an unusual or unexpected occurrence with respect to operation of the aircraft—thus placing the burden on carriers to establish that the occurrence could not have been avoided by the exercise of due care. Although carriers cannot be expected to guarantee the safety of every passenger on every flight, they can at least be expected to operate their flights in the "usual, normal, and expected" manner, *Saks*, 470 U.S. at 406, and to show that any harmful deviations from that manner were not the result of inadequate care. That is what the Convention contemplates.

[8] Olympic appears to argue that the decision in *Tseng* is irrelevant to the issue in this case. We address that argument at pages 40-42 *infra*.

II. THE REFUSAL OF AN AIRLINE FLIGHT CREW TO FOLLOW STANDARD INDUSTRY PROCEDURES, WITH THE RESULTING EXPOSURE OF A PASSENGER TO LIFE-THREATENING CONDITIONS, IS NOT PART OF THE NORMAL OPERATION OF AN AIRCRAFT

A. The facts here plainly meet the definition of an "unusual" or "unexpected" occurrence. Although Olympic claims otherwise, the events aboard Flight 417 were anything but the "usual, normal, and expected operation of the aircraft." *Saks*, 470 U.S. at 406.

Most obviously, it was not "normal" for an Olympic flight attendant to refuse to do what international flight attendants typically do: provide an at-risk passenger with a different, less dangerous seat. Testimony at trial indicated, and the district court specifically found, that "the recognized standard of care for flight attendants during international air travel demands that a flight attendant make efforts to accommodate a passenger who indicates that he or she needs to be moved for medical reasons." Pet. App. 52a. The contrary course of action followed here—one that essentially forced Dr. Hanson to remain in an ongoing life-threatening situation—was so out of the ordinary that one witness, an experienced flight attendant and purser, declared: "I've never seen anybody treated like this on an international flight, so it's not—it's not airline service as far as I experienced or I would expect." Pet. App. 71a; J.A. 70 (testimony of Diana Fairechild). Saying that she was "shocked" by the behavior, the witness described it as "criminal." Pet. App. 71a; J.A. 73.

Likewise, it was not "normal" for the flight attendant to disregard the policy of her own airline. Again, testimony indicated that "Olympic crew members generally make efforts to move passengers who become ill during flights if moving those passengers will assist in their recovery," Pet.

App. 53a; J.A. 79 (testimony of Eleni Xourgia), a policy that could readily have been followed here given the availability of empty seats and additional seats occupied by non-revenue passengers. At the very least, Olympic policy requires its attendants to alert the chief cabin attendant of medical requests. *See* Pet. App. 54a. Ms. Leptourgou did neither, electing instead to instruct Ms. Husain that Dr. Hanson could not be moved and that, as far as the airline was concerned, he would have to remain in his seat by the smoking section.

The result of these actions was also far from "normal": by virtue of her refusals, Ms. Leptourgou left an allergic passenger continuously exposed to hours of harmful cigarette smoke. Nor did she do this unwittingly. As the district court found, the number and increasing urgency of Ms. Husain's pleas were fully sufficient to inform Ms. Leptourgou of the medical risks resulting from her behavior. *See* Pet. App. 68a-69a ("Ms. Leptourgou cannot have failed to recognize that Dr. Hanson's problem was a medical one and that sitting near the smoking section was likely to cause him injury"). Yet her response was repeatedly to insist that—unless Ms. Husain herself arranged another seat—Dr. Hanson had to remain where he was.

The refusal by Ms. Leptourgou to heed either industry or company policy is a textbook example of an "unusual" or "unexpected" occurrence. It is, by definition, unusual when the crew of an airline refuses to do what it usually does. Whatever the ultimate scope of the term "accident" may be, it surely encompasses actions—or inactions (*see* pages 30-33 *infra*)—that are directly contrary to common practice in the industry. Under no circumstances can the violation of industry standards be considered "the usual, normal, and expected operation of the aircraft." *Saks*, 470 U.S. at 406.

Olympic, in fact, does not directly argue to the contrary. Rather, it mounts an attack on additional language in the court of appeals' opinion, which provides that "[t]he failure to

act in the face of a known, serious risk satisfies the meaning of 'accident' within Article 17 so long as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane." Pet. App. 14a. This observation by the Ninth Circuit suggests a potentially broader question: whether the failure of an airline to do something that it arguably should do—but usually does *not* do—also constitutes an "accident" under Article 17. But it is wholly unnecessary to answer that question here. The Ninth Circuit, like the district court, specifically found that the failure to follow "industry standards" and "Olympic policy" was, in and of itself, "unexpected and unusual." *See* Pet. App. 14a; Pet. App. 52a-56a. That reasoning alone is enough to support the judgment below. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (this Court "reviews judgments, not opinions").[9]

Olympic also argues that the presence of smoke in the cabin was "normal," Pet. Br. 16, apparently meaning to suggest that the entire flight was normal as well. But this assertion ignores two important principles established by *Saks*. Most directly, it ignores the fact that the definition of "accident" does not require every link in the chain of causation to be an unusual event. Rather, as the Court said in *Saks*, it is necessary only "that the passenger be able to prove that *some link* in the chain was an unusual or unexpected

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[9] Even if this case did not involve a violation of industry and company standards, we think that the arguments made by Olympic would be meritless. Although a "failure to act in the face of a known, serious risk" may not always be unusual or unexpected, it is certainly so when action is clearly called for and easily performed. Indeed, Olympic never explains why it would be "expected" for an airline to ignore the medical needs of a passenger when the solution is simply to move him to an available empty seat away from the source of harm.

event external to the passenger." 470 U.S. at 406 (emphasis added). The actions by Ms. Leptourgou in violation of industry standards, by themselves, establish that unusual link.

Olympic disregards a second admonition in *Saks* as well: that the "definition [of 'accident'] should be flexibly applied after assessment of *all the circumstances* surrounding a passenger's injuries." 470 U.S. at 405 (emphasis added). Although Olympic purports to follow that course, it takes much too narrow a view of what "all the circumstances" actually are. While the existence of ambient smoke is certainly one circumstance, there are the added circumstances that Olympic seated Dr. Hanson near to the smoke; that standard industry and company policies were to move him away from the smoke for medical reasons; that Ms. Leptourgou ignored those policies and the policy of communicating medical requests to the chief cabin attendant; and that Dr. Hanson was thus left to sit amidst the dense smoke to the point of respiratory distress. By focusing on the existence of the smoke, Olympic is simply isolating one circumstance from the other circumstances leading to Dr. Hanson's death. That *combination* of circumstances was not, by any reasonable standard, normal. *See Saks*, 470 U.S. at 405 ("In cases where there is contradictory evidence, it is for the trier of fact to decide whether an 'accident,' as here defined, caused the passenger's injury").

Lord Phillips of the Court of Appeal in England made precisely this point in distinguishing the events in this case from those in a case involving a failure to warn passengers of the risk of deep vein thrombosis. *See The Deep Vein Thrombosis and Air Travel Litigation*, [2003] EWCA Civ. 1005, at ¶ 50. Noting that "[t]he direct cause of [Dr. Hanson's] death was the unnecessary exposure to the smoke," *id.*, Lord Phillips pointed out that "[t]he refusal of the attendant to move him could be described as insistence that he remain seated in the area exposed to smoke." *Id.* Lord Phillips then

observed: "The exposure to smoke in these circumstances could, in my view, properly be described as an unusual or unexpected event [under the *Saks* definition]. While smoke in that part of the cabin was not itself unusual or unexpected, the same cannot be said of Dr. Hanson's enforced exposure to that smoke." *Id.* (emphasis added).[10]

Relying on *Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1521 (11th Cir. 1997), Olympic also argues that Article 17 calls for "a purely factual description of the relevant events." Pet. Br. 24. All that means, however, is that presumptive liability under Article 17 does not turn on legal characterizations about whether the actions of a flight crew were, or were not, negligent. The proper approach is to examine whether the facts demonstrate an unusual occurrence during the flight, not to ask whether that unusual occurrence meets the legal standard for establishing a want of due care. But, in order to make the former inquiry, it is nevertheless necessary for the factfinder to look comprehensively at all the relevant circumstances. Those circumstances naturally may include whether the conduct of the flight crew was in keeping with what a flight crew usually does on a "normal" flight.

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[10]Although the Court of Appeal concluded that the failure to warn about deep vein thrombosis was not an "accident," that result is not at odds with the Ninth Circuit decision here. The parties to *The Deep Vein Thrombosis* case expressly stipulated that "the flight was operated in accordance with all of the Defendant's usual procedures and practices," *id.* at ¶ 6.4(2), and there was no issue with regard to departure from general industry standards. Furthermore, while Lord Phillips did place some weight on the fact that a failure to warn is an "omission," he agreed that "the distinction between acts and omissions can in some circumstances be dubious" and explicitly stated that "*Husain* . . . is an example of such circumstances." *Id.* at ¶ 62. *See* pages 30-33 *infra*.

In short, there was an "accident" on board Flight 417. Faced with two possible courses of action, Ms. Leptourgou chose to disregard standard industry and company practice, consigning Dr. Hanson to a seat where he could not breathe. That unusual, and unfortunate, action ultimately cost him his life.

B. Olympic resists this conclusion on several grounds, all of them unpersuasive. To start with, it advances the stark proposition that while an affirmative act may itself be an "accident" (for example, a flight attendant assaulting a passenger), an omission can *never* be an "accident." Pet. Br. 18. But this "bright line" between acts and omissions makes little sense. First of all, the line is anything but bright. As the facts in this case demonstrate, what happens during an airplane flight can often be characterized as either an act or an omission, without any meaningful difference between them. Thus, the events in this case can be described as either a refusal to reseat Dr. Hanson or an insistence that he remain where he was (absent self-help), and further described as either a failure to act in accordance with standard practice or as the taking of actions contrary to standard practice. The difference to be derived from these descriptions, if there is a difference at all, is immaterial.

The invitation to make difficult distinctions between acts and omissions also misses the basic point established in *Saks*. The critical question for purposes of identifying an "accident" is whether something unusual happened with respect to the flight, not whether it took a particular form. Looked at that way, it seems clear that a departure from usual procedures is an unusual or unexpected event, regardless of how it is characterized. Thus, if a flight crew normally follows certain procedures, the failure to follow them is unusual; conversely, if a crew typically does not do something, it is unusual suddenly to do it. Even leaving aside hard questions of

categorization, the theory that acts in derogation of policy are unusual, but omissions in derogation of policy are not, is unfounded.[11]

The Convention itself makes no explicit distinction between acts and omissions, at least insofar as the ultimate issue of liability is concerned. Article 25, for example, provides that the liability caps of Article 22 shall not apply in the event of "wilful misconduct or . . . *such default* on [the carrier's] part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct." *Id.* (emphasis added). Likewise, Article 20(1) makes clear that the "due care" defense is unavailable when a carrier has failed to (*i.e.*, omitted to) take "all necessary measures to avoid the damage." Thus, under the Convention, default or inaction by a carrier is as much a basis for liability as improper actions.

It is true that the law of torts historically recognized that persons have no general duty to aid other persons in distress, *see* Restatement (Second) of Torts § 314 (1965); *Prosser and Keeton on The Law of Torts* § 56, at 375 (5th ed. 1984) (*Prosser and Keeton*), but that doctrine is no help to petitioner here. Whatever its overall merits may be, it is well recognized that the "no duty to aid" concept is generally inapplicable where one party exerts custody or control over the other. *See* Restatement (Second) of Torts § 314A (1965); *Prosser and Keeton* § 56, at 376-77. That is precisely the

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[11] The distinction would also lead to bizarre results. Thus, if a passenger simply took another seat without permission, and was ordered to return to his assigned seat despite his allergy to smoke, that order would clearly be an "affirmative act" under the view urged by Olympic. Yet, the effects of that conduct would be just the same as the effects here: Olympic would still have violated industry and company practice, and the passenger would still have been forced to sit amidst hazardous cigarette smoke. It is irrational to think that Olympic should be liable in one case, but not the other.

relationship between carriers and passengers on international flights: the carrier is in control of the flight, and passengers must conform their behavior to its governing rules and regulations. Indeed, passengers that violate those rules may be subject to arrest and prosecution. *See* 49 U.S.C. § 46504 (prohibiting "interfer[ence] with the performance of the duties" of a flight crew or attendant by means of assault or intimidation).

The control exercised by a carrier applies with particular force to seating aboard the aircraft. Unless the carrier permits open seating, where passengers are free to select their own seats upon boarding, a passenger is expected to sit in the seat to which he or she has been assigned by the carrier. Although a passenger may request particular seating, it is ultimately up to the carrier to decide where he or she must sit. Likewise, a passenger wishing—or, like Dr. Hanson, needing—to change seats is dependent upon the carrier to bring that change about.

Against this backdrop, it is implausible to think that the signatories to the Convention adopted a liability system permitting carriers simply to ignore passengers that need assistance. Not only would that be a strikingly harsh position, but it would endorse an approach to safety on the part of international air carriers that would be difficult to justify as a matter of sound practice. Furthermore, that view of the treaty-created liability system would be in tension with the fact that the Convention provides for liability from the point of embarkment to the point of disembarkment, a decision indicating that the signatories recognized a connection between a carrier's control over its passengers and potential liability for their deaths or injuries. Although there will inevitably be issues with regard to how far a duty to assist passengers should extend, it hardly seems unreasonable to expect that carriers at least will provide routinely available assistance to passengers in medical distress, and the industry has developed a general practice of doing so. By following

that practice, the airlines are simply acknowledging that the exercise of control over their passengers—a necessary aspect of their business—carries with it certain obligations with respect to how those passengers are treated.

Amicus curiae Air Transport Association of America, Inc., insists, however, that, if airlines must hew to industry standards, that obligation "will discourage airlines from undertaking efforts to protect passengers or to prevent foreseeable injuries." ATA Br. 14 n.12; *see also id.* ("the standard in the industry will become simply to make no effort to do so"). The accuracy of this claim is plainly open to question, given the likely public reaction to, and commercial effects of, any collective decision by airlines to reduce safety measures. Furthermore, we doubt that a policy of not having policies would actually work as a method of defeating liability under the Convention. *See* note 9 *supra*. But, in any event, the failure to observe industry standards does not itself make carriers liable for causing death or bodily injury: at most, it means that plaintiffs, having satisfied the threshold requirements of Article 17, are entitled to the benefits of presumptive liability, subject to whatever defenses the carriers are able to assert. *See* pages 33-37 *infra*. And, of course, the carriers still have the advantage of limiting any eventual recoveries according to the ceilings that the Convention imposes.

C. Treating a departure from industry standards as an unusual event does not, as Olympic contends (Pet. Br. 25-28), import the "due care" defense of Article 20(1) into the liability provisions of Article 17. Olympic has simply misunderstood the difference between the proof needed to show abnormal conduct during a flight (the "accident") and the often similar proof needed to show fault on the part of the carrier (the "lack of due care").

The point here is a well-accepted one in the law of torts: a plaintiff does not establish negligence merely by showing that

the defendant failed to adhere to a common practice, just as the defendant does not automatically avoid a finding of negligence by showing that it did adhere. Indeed, this Court expressly recognized that basic principle more than a century ago. *See Texas & P. Ry. Co.*, 189 U.S. at 470. There, Justice Holmes, writing for the Court, observed: "The charge [to the jury] embodied one of the commonplaces of the law. What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." *Id.*; *see also Wabash R. Co. v. McDaniels*, 107 U.S. 454 (1883). The same law is commonplace today. *See, e.g.*, Restatement (Second) of Torts § 295A (1965); *Prosser and Keeton* § 33, at 195 ("[A]s a general rule, the fact that a thing is done in an unusual manner is merely evidence to be considered in determining negligence, and is not in itself conclusive"); *L&C Marine Transport, Ltd. v. Ward*, 755 F.2d 1457, 1463 (11th Cir. 1985) ("Custom is not dispositive in negligence actions"); *Institute of London Underwriters v. Eagle Boats, Ltd.*, 918 F. Supp. 297, 300 (E.D. Mo. 1996) (evidence of custom and usage "does not set the legal standard of care"); *Doe v. American National Red Cross*, 848 F. Supp. 1228, 1233 (S.D. W.Va. 1994) ("Customary practice does not prescribe the duty of care").

The reasons for this doctrine are readily apparent. Whatever common practice may be, it does not necessarily correlate with the legally appropriate standard of care. *See, e.g., Anderson v. Malloy*, 700 F.2d 1208, 1212 (8th Cir. 1983) ("Evidence of the customs and practices of a trade or industry does not establish the legal standard of care to which a party is held"). Thus, even though a defendant may have fully complied with industry custom, that custom may itself fall short of the standard of due care. *See, e.g., SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir. 2001). On the other hand, a defendant may have failed to live up to an industry standard that goes beyond the basic requirements of due care, so that a plaintiff proving noncompliance has not, by that proof alone, shown actual negligence. *See, e.g., Anderson v. Malloy*, 700 F.2d at 1212 ("Nor does the fact that a person deviated from or conformed to an accepted custom or practice establish conclusively that the person was or was not negligent"); *Easterly v. Advance Stores Co., Inc.*, 432 F. Supp. 7, 9 (E.D. Tenn. 1976) ("[C]ustom is not conclusive on the issue of due care or lack of it. Conformity with custom is some proof of due care, and nonconformity some proof of negligence") (internal quotation marks omitted).[12] In either case, it remains for the courts to decide what the law does, or does not, require. *See The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) (L. Hand, J.) ("Courts must in the end say what is required").

Naturally enough, evidence about abnormal behavior will often be *relevant* to the ultimate inquiry about due care, *see, e.g., Prosser and Keeton* § 33, at 195; *Colorado Mill. and Elevator Co.*, 350 F.2d at 278, but that fact does not make the inquiries the same, only similar. Indeed, this Court expressly recognized the potential overlap between the two issues in *Saks*. The Court first declared that "[t]he 'accident' requirement of Article 17 is distinct from the defenses in Article 20(1)," 470 U.S. at 407, pointing out that one "involves an inquiry into the nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury."

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[12] The first example, not unexpectedly, is more common than the second because it is more likely for industry standards to be set too low than too high. Nonetheless, it remains the plaintiff's burden to show that the failure to meet industry standards amounts to an absence of reasonable care. *See Colorado Mill. & Elevator Co. v. Terminal R.R. Ass'n of St. Louis*, 350 F.2d 273, 278 (8th Cir. 1965) ("This Court and others have many times held that proof of custom while relevant and admissible in evidence of negligence is not conclusive thereof").

In the very next sentence, however, the Court went on to observe that "these inquiries may on occasion be similar . . . ." *Id.*

Olympic quotes only the first sentence in its brief, neglecting the second. But this edited version distorts the point that the Court was making. Thus, while an inquiry under Article 17 is undeniably "distinct" from an inquiry under Article 20—in the sense that a plaintiff has the *lesser* burden of having to prove only an unusual event, not a lack of care—it is to be expected that the inquiries will often look quite alike. After all, both require a kind of comparison: Article 17 calls for a comparison between what happened and what would be usual or expected, while Article 20 calls for a comparison between what happened and what should have happened with the exercise of due care ("all necessary measures"). At bottom, however, the Article 17 and Article 20 inquiries ask separate questions and thus require separate answers.[13]

Olympic apparently would prefer to shut off any Article 17 inquiry into what a flight crew usually does. But it seems self-evident that, in order to identify abnormal events or happenings, *Saks*, 470 U.S. at 405, there must be a benchmark regarding what is normal. Here, we are simply saying that one benchmark for judging "the usual, normal and expected operation" of an aircraft is the standard of behavior observed by flight crews within the industry or, alternatively,

[13] Although the questions and answers are separate, that does not mean that they must always require different proof. It is one thing to say that proof of negligence is not *necessary* to satisfy Article 17, quite another to say that it is not *sufficient*. Indeed, it seems obvious that the failure of a carrier to exercise due care will often be something other than the "normal" operation of an aircraft. And, it would be strange indeed if a carrier could use the fact that its behavior was so abnormal as to be negligent as the very reason for insisting that an injured passenger be denied recovery. Given the facts here, however, the Court need not reach this issue.

within the particular carrier itself. As we have noted, *see* page 27 *supra*, that benchmark requires no judicial speculation about what those practices ultimately should be. Instead, it takes account of what is typically done, and recognizes that a departure from that regular behavior is "unusual." That is sufficient to establish an "accident" under Article 17.

D. Olympic also places great emphasis on the fact that Dr. Hanson had a pre-existing allergy to cigarette smoke. But this fact is fully compatible with the conclusion that an "accident" occurred on board Flight 417. In its argument, Olympic is essentially mixing up the question whether there has been an "accident" with the question whether the "accident" caused his death. Those are separate issues, and the courts below properly resolved both of them against Olympic.

The decision in *Saks*, in fact, makes quite clear that a passenger's pre-existing medical condition does not preclude a finding that an "accident" occurred aboard her flight. In determining that Ms. Saks could not recover for her hearing loss, the Court held only that a carrier is not liable for an injury resulting "from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." 470 U.S. at 406. Thus, to foreclose liability at the Article 17 stage, there must be two separate determinations: *first*, an "internal reaction" and, *second*, "the usual, normal, and expected operation of the aircraft." Nothing in *Saks* says that an "internal reaction," by itself, precludes recovery, even when that reaction was directly caused by the unusual operation of the flight (an "external" event). Indeed, the unstated premise of that decision is just the opposite: that Ms. Saks could have recovered for her injury if operation of the Air France pressurization system had been abnormal.

The contrary view would lead to absurd results. Thus, for example, it would immunize an airline from liability for an elderly passenger's heart attack even if the airline caused the

attack by falsely telling passengers that the plane was going to crash. Or, to bring the example closer to this case, it would allow Olympic to avoid liability for the death here even if it had ordered Dr. Hanson to sit in the *smoking* section of the aircraft or had caused his asthma attack by setting off an uncontrolled fire in the aircraft galley. Although a passenger with no pre-existing condition might escape injury in those circumstances, the fact remains that something "unusual" and "unexpected" happened during the flight to cause the injury that occurred. Once that has been established, the Convention provides no basis for using Article 17 as a barrier against passengers on the basis of their prior medical histories. *See generally* Restatement (Second) of Torts § 461 (1965); *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175, 1192 (9th Cir. 2002) (referring to "time-honored legal principle that a wrongdoer takes his victim as he finds him") (internal quotation marks omitted); *Meyers v. Wal-Mart Stores, East, Inc.*, 257 F.3d 625, 632 (6th Cir. 2001) (same).

Petitioner argues that the decision of the Third Circuit in *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130 (1984)—cited by this Court in *Saks*, 470 U.S. at 405—demonstrates otherwise. But the Third Circuit did not hold that a prior medical condition bars the finding of an "accident" under Article 17: it held only that "[i]n the absence of proof of abnormal external factors, aggravation of a pre-existing injury *during the course of a routine and normal flight* should not be considered an 'accident' . . . ." 739 F.2d at 133 (emphasis added). Indeed, each of the cases cited for that proposition involved injuries that had arisen without any demonstration of abnormal activity external to the passengers themselves. *See Warshaw v. Trans World Airlines*, 442 F. Supp. 400 (E.D. Pa. 1977) (injury resulting from normal change in cabin pressure); *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971) (injury resulting from fall apparently caused by passenger's internal condition). This Court thus correctly included *Abramson* (and *MacDonald*) among a list of cases

that "refuse[d] to extend the term ['accident'] to cover routine travel procedures that produce an injury due to the peculiar internal condition of a passenger." *Saks*, 470 U.S. at 405; *see also id.* (parenthetically describing *Abramson* as holding that "sitting in airline seat during normal flight which aggravated hernia not an 'accident'"). Those cases say nothing about proper application of the term when the travel procedures are not "routine" or "normal."[14]

Pre-existing conditions, of course, may be important to the ultimate question whether the carrier is liable for a death or injury. In particular, the prior medical condition of a passenger may affect whether the particular "accident" in question actually caused his or her injury. When a passenger suffers a heart attack during an uncommonly turbulent flight, the carrier may well be able to demonstrate that the severe turbulence—though an unusual happening and thus an "accident"—nonetheless had little or nothing to do with the attack. Likewise, a passenger may suffer a serious injury aboard a flight even though the flight crew has scrupulously observed all standard procedures. The more serious the pre-existing condition, the more persuasive these "lack of causation" arguments are apt to be.

Not surprisingly, the question of causation was a central issue in this case. Throughout the proceedings below, Olympic maintained that Dr. Hanson had died as a result of his allergies to food, not smoke, and further argued that the smoke in the cabin was too mild to be a significant factor in his death. Although the Ninth Circuit stated that the issue of

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[14] We note that, while the plaintiff in *Abramson* had alleged that the "refusal to aid him" was an unusual event, *see* 739 F.2d at 132, he failed to establish that any acts or omissions by the flight crew were unusual under the circumstances presented there. In particular, he did not establish that the flight crew had deviated from accepted industry or company standards by failing to find him a suitable location for his self-help remedies. The findings here, of course, do establish such a deviation.

causation was "a close call," Pet. App. 17a, it ultimately chose to resolve that issue on the basis of the findings of the district court. Those findings, which the court of appeals held not to be clearly erroneous, Pet. App. 17a, were that "Dr. Hanson's death was caused, at least in significant part, by smoke inhalation which triggered a severe asthmatic reaction" and that "Olympic's failure to move Dr. Hanson caused Dr. Hanson's death." Pet. App. 59a.

III. A FLEXIBLE READING OF ARTICLE 17 IS CONSISTENT WITH THE OVERALL OBJECTIVES OF THE CONVENTION.

A. A prominent theme advanced by Olympic is that, after this Court held that remedies under the Convention are exclusive, *see Tseng*, 525 U.S. at 167-76, various lower courts improperly expanded the definition of "accident" to assure that plaintiffs would be able to obtain relief. *See* Pet. Br. 28-31. To the extent that Olympic is saying that courts should not rewrite the Convention simply to reach desired results, its position is obviously correct. *See Saks*, 470 U.S. at 406. But, to the extent that Olympic means to say that *Tseng* must be ignored in determining what signatories to the Convention intended, it is just as clearly wrong.

This Court has said that the aim of treaty interpretation is "to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Saks*, 470 U.S. at 399; *see also Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 675 (1979) ("it is the intention of the parties . . . that must control any attempt to interpret the treaties"). Thus, while the process of interpretation properly focuses on the words used by the signatory nations, it does so in the context of the structure and objectives of the treaty as a whole. Part of that broader inquiry, in turn, looks to the practical effects that competing interpretations of treaty language might produce.

An interpretation that leads to incongruous results is properly rejected. *See generally Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 130 (1989).

That principle of treaty interpretation is evident in *Tseng* itself. There, the Court was faced with a choice between two interpretations of the Convention, one making the Convention the sole avenue of recourse for passengers on international flights and the other allowing certain suits to proceed separate and apart from the Convention. Although the latter interpretation had support (indeed, perhaps, greater support) in the specific language of the treaty, the Court nevertheless adopted the former interpretation, in large part because it was more consistent with the overall objectives of the Convention. *See* 525 U.S. at 170-73. The Court specifically noted that a reading of the treaty permitting suits outside the Convention "could produce several anomalies" that the signatories were unlikely to have intended. *Id.* at 171.[15]

The same potential exists here. If Olympic were correct about its view of the term "accident," it would have the effect of sheltering Olympic from liability for a death caused by its willful misconduct, even though the Convention plainly appears to contemplate liability for deaths caused by carriers that cannot make the Article 20(1) showing of due care. Furthermore, it would leave Ms. Husain without any remedy at all for her husband's death. While that is perhaps not an inconceivable result—the Convention does leave passengers who suffer only psychological injury without a remedy, *see Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991)—it seems very unlikely that the signatories intended that out-

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[15] The plaintiff in *Tseng* argued that the view ultimately adopted by the Court would produce an even greater "anomaly": relieving carriers of liability for willful misconduct. The Court, however, indicated that this anomaly would not arise, emphasizing its prior admonition that the term "accident" be "flexibly applied." 525 U.S. at 172 (quoting *Saks*, 470 U.S. at 405).

come in a liability scheme that deals broadly and comprehensively with responsibility for death and bodily injury. *Cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) ("difficult to believe that Congress would, without comment, remove all means of judicial recourse to those injured by illegal conduct"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996) (same).[16] And, it seems especially improbable that they would have sought to achieve that end by using the word "accident" in a way contrary to its normal meaning, rather than by making their intention explicit in the provisions specifically designed to relieve carriers of their liability.

Olympic correctly points out (Pet. Br. 14) that one purpose of the Convention was to limit the liability of international air carriers. But that does not mean that the Court must adopt any possible interpretation of the Convention that lessens liability. The Convention also sought to advance "the interests of passengers seeking recovery for personal injuries," *Tseng*, 525 U.S. at 170, and that interest must be taken into account as well. *Id.* Here, it seems appropriate to strike the balance by permitting passengers to proceed with claims based on the failure of a carrier to observe governing industry standards, placing on the carrier the burden of showing that it had good reason for that departure. That balance properly reflects the intention of Article 17 to create broad presumptive liability in the event of unusual flight-related occurrences, as well as remaining faithful to the original fault-based liability scheme of the Convention as a whole.

B. Olympic also claims that "post-ratification" history shows that the term "accident" should be given a narrow

[16] In contrast, the decision not to impose liability for purely psychological injuries is readily understandable given the novelty of international air travel at the time that the Convention was drafted. That is particularly so in light of the traditional legal notion that psychological injury in the absence of accompanying physical injury was not compensable. *See Eastern Airlines v. Floyd*, 499 U.S. at 544-45.

meaning. But it shows nothing of the kind. All that the history demonstrates is that various nations have been reluctant to do away with the term "accident," resisting efforts to replace it with the terms "occurrence" or "event." *See* Pet. Br. 32-35. Those discussions, in turn, prove only that "accident" is a narrower term (an *unusual* occurrence or event), a point that this Court has already made in *Saks* and that is not in dispute here.[17]

While post-ratification history confirms that "accident" is a narrower term than "occurrence" or "event," it sheds no comparable light what "accident" actually means. Although there are occasional remarks about its possible scope—in 1953, for example, a United States delegate indicated that "failure of the pressurization [system] . . . would seem to be included within the word 'accident'" (*see* ICAO Legal Committee, Minutes and Documents of the Ninth Session, Rio de Janeiro, 25 August—12 September 1953, ICAO Doc. 7450-LC/136-1 at 71 (1954))—the gist of most post-Warsaw discussions is that Article 17 need not be further expanded, not that it was peculiarly restrictive to begin with. In particular, there is nothing to demonstrate that the term "accident" must be given other than its ordinary meaning of an unusual or unexpected event. Thus, even if this kind of uncertain later history were to be accorded weight here, it would only reinforce the definition of "accident" that this Court adopted in *Saks*.

[17] The Montreal Convention, recently ratified by the Senate, retains the term "accident" in a somewhat reworded provision: "The carrier is liable for damages sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Convention for the Unification of Certain Rules for International Carriage by Air, Done at Montreal, May 28, 1999, Treaty Doc. 106-45 (ratified July 31, 2003), Art. 17.1.

The post-ratification history, however, does provide an illuminating counterpoint to Olympic's effort to escape liability for its own misconduct. For, while Olympic is urging a position that would *reduce* carrier liability for deaths or injuries caused *by fault*, the post-ratification trend has been in the opposite direction: that is, to *increase* liability for injuries or deaths that occur *without fault*. Thus, in addition to promoting efforts to raise the liability ceilings, certain nations, including the United States, have repeatedly urged modifications to the Convention that would impose at least some liability without regard to fault on the part of the carrier. To a considerable degree, those efforts have been successful. Thus, for example, most airlines agreed to waive their Article 20(1) defenses in the 1966 Montreal Interim Agreement, *see* Agreement CAB 18900, approved by Civil Aeronautics Board Order No. E-23680, May 13, 1966, 31 Fed. Reg. 7302 (1966), and a number of airlines subsequently consented to a similar waiver as part of the International Air Transport Association Agreement. *See* International Air Transport Association Intercarrier Agreement on Passenger Liability, approved by D.O.T. Order 96-11-6 (D.O.T. Nov. 12, 1996). Most recently, that principle was embodied in the 1999 Montreal Convention, which provides that carriers are liable, without regard to their degree of care, for damages up to a specified amount. *See* 1999 Montreal Convention Art. 21.

This course of events reflects a growing consensus that carriers should bear at least some liability in the event of "unusual" occurrences, even when they might be able to meet the standards of a "due care" defense. Conspicuously absent, however, is any comparable momentum for what Olympic asks here: the making of exceptions to liability when carriers are at fault. This absence is hardly anomalous. Because the Convention was constructed as a fault-based system, the reasonable working assumption is that carriers are liable, and

should be liable, for deaths or bodily injuries that are their fault. The interpretation of "accident" proposed by Olympic is directly contrary to that basic approach.

Olympic also seeks to use language in the (unratified) Guatemala City Protocol to demonstrate that carriers should not be liable for injuries or deaths "resulting solely from the state of health of the passenger." *See* Pet. Br. 34 (quoting Guatemala City Protocol Art. IV). But we do not contend, and the courts below did not find, that Olympic is liable for a death resulting "solely" from Dr. Hanson's asthma. The plain fact is that, had Dr. Hanson been provided a seat distant from the smoke, his asthma would not have claimed his life. *See* Pet. App. 60a ("If Ms. Leptourgou had moved Dr. Hanson out of the vicinity of the smoking section, he would not have died aboard Flight 417"). Thus, regardless of the language of the Guatemala City Protocol, Olympic would still be responsible for Dr. Hanson's death.

In the end, Olympic never really comes to grips with what it did in this case. Simply put, Olympic caused Dr. Hanson's death by needlessly confining him to a seat in the midst of heavy, life-endangering smoke. Its inexplicable decision to do so—in direct contravention of industry practice and its own policy—was not the "usual, normal, and expected operation of the aircraft." *Saks*, 470 U.S. at 406. It was an "accident" under the terms of the Convention, and the decision below, making that determination, was correct.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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Supreme Court of the United States

OLYMPIC AIRWAYS,

Petitioner,

—v.—

RUBINA HUSAIN, ETC., *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER OLYMPIC AIRWAYS

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REPLY TO COUNTER-STATEMENT OF THE FACTS

Respondents and the Solicitor General recharacterize what transpired on OLYMPIC AIRWAYS flight 417 as a "medical crisis" and as the failure of a crew member to respond to the needs of an ill passenger. Brief for Respondents ("R. Brief") at 11, 25, 26, 28, 30, 32; Brief for the United States Amicus Curiae Supporting Respondents ("S.G. Brief") at 10-11, 14-15, 17, 19, 22, 25. The record, however, clearly shows that:

- while Dr. Hanson and Ms. Husain knew that he was ill as a result of his exposure to smoke in the Athens airport, OLYMPIC AIRWAYS was never told that Dr. Hanson was ill (Pet. App. at 6a);[1]
- Dr. Hanson and Ms. Husain knew that this was a smoking flight three OLYMPIC AIRWAYS flights prior to their travel on flight 417 (Pet. App. at 5a-6a);
- neither Dr. Hanson nor Dr. Sabharwal, an allergist who was traveling with Dr. Hanson, ever requested that Dr. Hanson be moved or advised that he was ill; and
- although Ms. Husain requested that Dr. Hanson be moved twice prior to departure and once after take-off (immediately after smoking was allowed), neither Dr. Hanson, Ms. Husain *nor* Dr. Sabharwal ever advised the flight crew that Dr. Hanson was ill or suffering a "medical crisis" (Pet. App. at 6a-8a).

Moreover, there is no support in the record that OLYMPIC AIRWAYS insisted to anyone in the Hanson/Husain traveling party that Dr. Hanson remain in his non-smoking seat. In fact, the flight attendant specifically advised Ms. Husain that she was free to request another

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[1] References preceded by "Pet. App." refer to pages in the Appendix to the Petition for Writ of Certiorari.

passenger to change seats with Dr. Hanson (Pet. App. at 7a), but neither Dr. Hanson nor Ms. Husain ever did so. Pet. App. at 74a. Dr. Hanson, however, "chose not to act" (*id.*) and remained seated until after the meal service, when he walked to the galley area, collapsed and died.[2]

ARGUMENT

The question before the Court is not whether the Warsaw Convention[3] makes OLYMPIC AIRWAYS liable for wilful misconduct, as argued by Respondents. R. Brief at 13. The only issue to be decided is whether Dr. Hanson's death was caused by an "accident" within the meaning of Article 17 of the Convention.

Regardless of how stated, Respondents and the Solicitor General advance essentially three arguments to support the judgment (while taking care not to embrace the rationale of the court below, *see* R. Brief at 27): (1) that the term "accident" should be broadly construed to create liability for any unusual or unexpected "occurrence;" (2) that the signatories to the Convention did not intend to preclude liability for negligent conduct on the part of the carrier; and (3) that because the Convention provides the exclusive cause of action, the signatories must have intended to ensure a right of recovery whenever there is fault on the part of the carrier. Each of these arguments is premised on common-law policy grounds in an improper attempt to expand the meaning of "accident" to include an injury that is the result of the pre-existing health condition of a passenger.

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[2] Respondents estimate this time frame to be a "few hours." R. Brief at 4; *but see* Pet. App. at 41a ("Approximately two hours into the flight, the crew served a meal.")

[3] The complete text of the Warsaw Convention is set forth in the Appendix to the Brief of Petitioner Olympic Airways at 1a-20a.

I

"ACCIDENT" IS A TREATY TERM OF ART THAT MUST BE FLEXIBLY BUT FAITHFULLY APPLIED BY THE COURTS

A. "Accident" Requires An Inquiry Into The Injury Producing Event And Not Whether The Carrier Was Negligent

Respondents misconstrue OLYMPIC AIRWAYS' argument (R. Brief at 13-15, 19-20, 25-30, 33, 37) in their attempt to manufacture an Article 17 "accident" where none exists. OLYMPIC AIRWAYS' position can be summarized as follows:

- the failure to act (whether unexpected or unusual) is not an "event" or "happening;"
- the failure to act can lead to an "event" or "happening," but did not in this case; and
- the decisions of the courts below improperly focused on crew negligence and held that any crew negligence is equivalent to the necessary "event or happening," rather than identifying the actual injury producing "event or happening" (here, the presence of smoke in the aircraft cabin).

OLYMPIC AIRWAYS' argument starts with the premise firmly established by the Court's decisions in *Air France v. Saks*, 470 U.S. 392 (1985), *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991) and *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999) that Article 17 of the Warsaw Convention creates a presumption of liability when the conditions precedent—that there has been an "accident" and that it caused a passenger bodily injury or death—have been met. As explained by *Saks*, if the injury is caused by the passenger's internal reaction to

the normal operation of the aircraft, there can be no "accident." *Id.* at 406. In determining whether there has been an "accident," all courts before and after *Saks* (until certain post-*Tseng* cases) have focused on whether there was an injury producing event and whether that event was unusual, unexpected and external to the passenger.

Here, Respondents and the Solicitor General attempt to deflect the Court's attention away from the injury producing event, *i.e.*, the smoke in the aircraft cabin, arguing that a crew member's failure to move Dr. Hanson in response to Ms. Husain's requests was contrary to industry standards and custom and, thus, *ipso facto*, was an "accident." Because the injury producing event about which Ms. Husain complained was the *usual and expected* presence of smoke on a smoking flight, there can be no "accident" within the meaning of Article 17.

1. *Saks* Already Has Defined The Article 17 Term "Accident"

By reliance upon dictionary and legal definitions of the term "accident" and its supposed common usage, Respondents argue that "accident" under the Convention must be construed as broad ranging and all inclusive. R. Brief at 9, 14, 16-24. Respondents then posit that an Article 17 "accident" can be any "occurrence" so long as it is "unusual" (here, a violation of OLYMPIC AIRWAYS and industry standards) and has a link to the passenger's injury. R. Brief at 14, 17-18, 20-21, 24, 26-28, 42-43. Despite their quoted dictionary definitions, even Respondents agree (R. Brief at 19) that the term "accident" under Article 17 already has been defined by *Saks*:

- A passenger's injury must be caused by an accident, and an accident must mean something different than an "occurrence" on the plane. *Saks*, 470 U.S. at 403.

- [L]iability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. *Id.* at 405.

While *Saks* noted that the term "accident" has been interpreted broadly by the lower courts in a variety of contexts, the Court made clear that the courts "nevertheless refuse to extend the term to cover routine travel procedures that produce an injury due to the peculiar internal condition of a passenger." *Id.* at 404-05. Respondents and the Solicitor General ignore this critical distinction. Even when the "accident" condition precedent is "flexibly applied" (*id.* at 405), a carrier should not be held liable for a passenger's peculiar internal reaction to the usual and expected presence of smoke on a flight where smoking was known to be permitted.

Respondents highlight the *Tseng* Court *dicta* as to whether the Second Circuit "flexibly applied" the accident analysis. R. Brief at 21-22, *citing*, 525 U.S. at 165 n9, 172. The most that can be gleaned from *Tseng* on this point, however, is that an intrusive security search possibly could be considered an unexpected or unusual event. Of course, if a person undergoing such a security search sustains a bodily injury, that injury likely would be the result of an injury producing event. The event, however, would not be the mere performance of a "routine" security search. No matter how flexibly the term "accident" is applied, the routine presence of ambient smoke on a smoking flight (the injury producing event here) cannot properly be considered unusual or unexpected. This case does not present an "accident."

2. A Flexible Definition Does Not Properly Equate "Accident" With Negligence

In the absence of an unusual or unexpected injury producing event, Respondents and the Solicitor General focus on crew negligence (*e.g.*, violation of standards, reasonableness of conduct, duty to act), which is not the proper focus of the Article 17 "accident" inquiry. The Court should reject Respondents' speculation that "[w]hile Article 20 expressly extinguishes liability upon a showing of proper care, it necessarily *permits* liability for a death or bodily injury if the carrier cannot make that showing." R. Brief at 23 (emphasis in original).

A "fault" analysis is a negligence analysis. Acceptance of Respondents' argument would require the Court not only to negate the Article 17 "accident" condition precedent and *Saks*' requirement that there be an injury producing event, but also reject the long line of cases refusing to impose liability arising out of a passenger's pre-existing health condition. *See* Brief of Petitioner at 21 & 21n.

The fallacy of Respondents' reasoning is illustrated by the fact that an Article 17 "accident" can take place even where the conduct that leads to the "accident" was *not* negligent.[4] For example, a passenger physically assaulted by another passenger may claim that the assault was unprecipitated and that there was an external, unusual and unexpected event irrespective of carrier negligence. Whether there has been an "accident" should not depend upon whether the carrier is entitled to avail itself of Article 20's "all necessary measures" defense

[4] Whether an "accident" also requires that the injury producing event relate to the operation of the aircraft (as advocated by the Solicitor General) is an issue that need not be reached herein. *See* S.G. Brief at 14-15.

(or be negated by the passenger's contributory negligence under Article 21). As stated in *Abramson v. Japan Airlines Co.*, 739 F.2d 130, 133 (3d Cir. 1984), "the alleged acts and omissions of JAL and its employees during the routine flight . . . do not constitute an 'accident' for which the Warsaw Convention imposes liability upon the carrier."[5] Failure of a carrier to take "all necessary measures" does not create an "accident."

3. The Proper Focus Of The "Accident" Inquiry Is On The Injury Producing Event

Respondents acknowledge that the "Article 17 and Article 20 inquiries ask separate questions and thus require separate answers" (R. Brief at 36), but nonetheless improperly fuse these questions to support the judgment. While the inquiries may be similar, it is axiomatic that there can be an "accident" without negligence and there can be negligence without an "accident." As explained by *Saks*, the proper focus "involves an inquiry into the nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury." 470 U.S. at 407 (emphasis in original). OLYMPIC AIRWAYS is simply following the *Saks* focus and is not "mixing up" the question of "accident" with causation. *See* R. Brief at 37.

The text of Article 17 confirms the reason for focusing on the injury producing event, rather than the negligence of the carrier. If negligence is the focus of the "accident" analysis, the language of Article 17 precludes

[5] *See also McDonald v. Korean Air*, 2002 Carswell Ont. 3094 at ¶17, 2002 WL 1861837, at *4 (Ont. S.C.J. Sept. 18, 2002) ("I find that in not advising passengers of the risk they assume, an airline may be negligent, but this negligence is not in itself an *accident* within the meaning of Article 17 in the sense that the DVT sustained by the plaintiff is not linked to an unusual and unexpected event external to him as a passenger."), *aff'd*, 171 O.A.C. 368 (Ont. C.A. Feb. 18, 2003), *leave to appeal refused by*, No. 29708 (S.S.C. Aug. 28, 2003) (Canada).

carrier liability for any negligence which does not take "*place on board the aircraft or in the course of any of the operations of embarking or disembarking.*" Instead, courts properly must focus the inquiry on the injury producing event and then determine whether that event was external, unusual and unexpected.[6] To illustrate, where a passenger is injured during a hijacking, the "accident" is not the alleged negligent screening, but the hijacker's act of injuring the passenger.

Courts have had no difficulty in concluding that bodily injury or death as a result of a hijacking is damage that has been caused by an "accident" *irrespective of where the negligence took place*. In the cases cited by *Saks* which involved an "accident," the inquiry centered on the injury producing event. *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977), *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1971), and *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (C.D. Cal. 1975) involved torts committed by terrorists; the injury producing event was the conduct of the terrorists.[7] In *Oliver v. Scandinavian Airlines Sys-*

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[6] *Compare* cases finding "accident": *Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 141-42 (2d Cir. 1998); *Gezzi v. British Airways PLC*, 991 F.2d 603, 605 (9th Cir. 1993); *with* cases finding no "accident": *Potter v. Delta Air Lines, Inc.*, 98 F.3d 881, 883-84 (5th Cir. 1996); *Cush v. BWIA Int'l Airways, Ltd.*, 175 F. Supp. 2d 483, 488-89 (E.D.N.Y. 2001); *Farra v. American Airlines, Inc.*, 2000 WL 862830, at *3 (E.D. Pa. June 28, 2000); *Brandt v. American Airlines*, 2000 WL 288393, at *7-8 (N.D. Cal. Mar. 13, 2000); *Warshaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400, 407 (E.D. Pa. 1977).

[7] These cases did not analyze the "accident" issue but simply followed *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973), which applied a hazards of air travel test to find that a hijacking can be an "accident." Regardless of whether this was a valid test (a similar test implicitly was rejected by *Saks*), the result is the same, an "accident" as it falls squarely within the *Saks* definition.

tem, 17 Av. Cas. (CCH) 18,283, 18,284 (D. Md. 1983), the court found that an "accident" occurred when a fellow passenger fell unexpectedly on the plaintiff, stating that "the proper focus is on what happened to the passenger." In *Weintraub v. Capitol Int'l Airways, Inc.*, 16 Av. Cas. (CCH) 18,058, 18,059 (N.Y. App. Div. 1981), the court focused on the sudden unexpected aircraft nose dive and not the reason for it. Even in *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1197-98 (3d Cir. 1978), the conflicting evidence focused on whether the aircraft pressurization system (*i.e.*, the injury producing event) functioned normally and not on the reason for its alleged malfunction.

Although *Saks* does not foreclose liability where there has been an injury producing event to a passenger with a pre-existing medical condition, *Saks* makes clear that there can be no liability if the injury producing event was normal and expected. 470 U.S at 404-05. For example, in *Abramson*, the Third Circuit found no "accident" when it focused on the injury producing event (sitting in his assigned seat), irrespective of allegations of crew negligence. 739 F.2d 130.

As explained by the Eleventh Circuit in *Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1521 n10 (11th Cir. 1997), the "accident" inquiry requires the identification of the relevant event by asking "what precise event or events allegedly caused the damage sustained by the plaintiff." In *Krys*, the relevant injury producing event was the continuation of the flight and resultant delay in hospitalization (*id.*), not the carrier's alleged negligence (*id.* at 1524 n17). Here, the injury producing event was exposure to ambient smoke while Dr. Hanson remained in his assigned non-smoking seat. The smoke aggravated his pre-existing asthmatic con-

dition and led to his death, not the flight attendant's failure to act or violation of industry standards.

Respondents neither reject nor meaningfully distinguish *Krys*, *Abramson*, or any of the other cases relied upon by OLYMPIC AIRWAYS. The Solicitor General disputes that *Krys* and *Abramson* (cited with approval by *Saks*, 470 U.S. at 405)[8] are consistent with *Saks* (S.G. Brief at 27-29) and yet agrees, as he must, that an injury resulting from deep vein thrombosis or a pre-existing health condition unrelated to the operation of the aircraft is not an "accident."[9] The Solicitor General's inconsistencies also are evident in his failure to explain how there could be an "accident" in *Krys*, *Abramson* and this case, but not in *Rajcooar* and *Northern Trust*. No valid distinction can be made. *See Rajcooar*, 89 F. Supp. 2d at 328 (allegedly inadequate medical care not an "accident"); *Northern Trust*, 491 N.E.2d at 422-23 (no "accident" despite allegations that the airline was negligent and violated its procedures for handling ill passengers).

4. Carrier Conduct That Was A Link In The Chain Of Causation Cannot Substitute For The Absence Of An Unusual and Unexpected Injury Producing Event

Respondents argue that the only requirement for an "accident" is some unusual and unexpected "occurrence"

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[8] *But see* Brief for the United States as Amicus Curiae Supporting Reversal, 1984 WL 565687, at *20. (In *Saks*, the Solicitor General took the position that the Third Circuit's application of the *DeMarines* standard in the *Abramson* decision was an example of the proper interpretation of the "accident" requirement).

[9] *See* S.G. Brief at 14, *citing*, *Rajcooar v. Air India Ltd.*, 89 F. Supp. 2d 324, 328 (E.D.N.Y. 2000); *Northern Trust Co. v. American Airlines, Inc.*, 491 N.E.2d 417, 422 (Ill. App. Ct. 1986); and *Scherer v. Pan Am. World Airways Inc.*, 54 A.D.2d 636, 387 N.Y.S.2d 580, 581 (App. Div. 1976).

in the chain of causation and that violation of industry standards is such an occurrence. *See, e.g.*, R. Brief at 11-12, 26. According to Respondents, the fact that Dr. Hanson had a pre-existing "medical condition" (*i.e.*, asthma and allergies) is irrelevant to the "accident" inquiry because there was a violation of an industry standard. R. Brief at 12, 25-26, 37-39. Respondents and the Solicitor General are unable to cite to a single case in which a court found an Article 17 "accident" based upon carrier conduct that was a remote, rather than direct, cause of the death or injury. Likewise, they cite no case finding an "accident" absent a direct injury producing event.

Saks requires an injury producing event, not merely an occurrence. The "unusual event" requirement takes on added significance in this case because, as acknowledged by the court below, Dr. Hanson's death was a result of his asthma, *i.e.*, his internal reaction to ambient smoke on board a flight where smoking was permitted. Pet. App. at 47a. To the extent that Respondents argue that *any* link in the chain of causation satisfies the "accident" requirement, they simply are wrong.

B. An Omission Or Failure To Act Is Not An "Event"

Respondents and the Solicitor General dismiss the distinction between "event" and "omission" as unfounded, arguing that an "accident" necessarily includes the failure to act or an "occurrence" so long as it is unusual. R. Brief at 30-31; S.G. Brief at 17.[10] The significance of the injury producing event in the "accident" analysis, however, is made clear when an unusual or unexpected injury producing event has not happened.

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[10] An attempt to avoid this distinction may account for Respondents' repeated use of the term unusual "occurrence" throughout their Brief, rather than the terms "event" or "happening" which were adopted by the Court in *Saks*.

Neither Respondents nor the Solicitor General are able to provide the Court with an example of an omission/failure to act as the identifiable event because an omission or failure to act is a non-event. A fair reading of every Article 17 "accident" case demonstrates that the injury producing event or happening necessarily involved an "act" rather than a failure to act. A failure to act, as here, cannot be the event; it simply may lead to an event. If it does not lead to an injury producing event, there has been no "accident." Even if an omission or failure to act leads to an injury producing event, the passenger still must establish that the injury producing event itself was external, unusual and unexpected for there to be an Article 17 "accident."

Respondents' example of the cook forgetting to turn off a cooking flame, causing a grease fire and then burning a person's arm demonstrates the fallacy of their reasoning. R. Brief at 16. The omission (*i.e.*, the failure to turn off the flame) is not the Article 17 "accident." Rather, the omission led to a grease fire (the unusual event/"accident"), resulting in the injury.

The distinction between an affirmative injury producing event and an omission is not a mere matter of semantics. R. Brief at 30-31. Historically, the distinction has been clear and valid in the context of Article 17, and the signatories' understanding of the difference was documented as early as 1949. *See* International Civil Aviation Organization ("ICAO") Legal Committee, *Minutes and Documents of the Fourth Session, Montreal, 7 June –18 June 1949, Report of the Sub-Committee on the Revision of the Warsaw Convention*, ICAO Doc. 6027-LC/124 at 270 (1949) (In rejecting replacement of "accident" with occurrence, it was noted that "the broader term 'occurrence' should be applied to damage sustained in the case of carriage of cargo or baggage, since *the*

term would include not only an accident but also cases where nothing of a positive nature had happened.") (emphasis added).

This distinction was reaffirmed this year by the English Court of Appeal in *Deep Vein Thrombosis and Air Travel Group Litigation*, [2003] EWCA Civ. 1005, 2003 WL 21353471 (C.A. Eng. July 3, 2003), *request for leave to appeal filed* (H.L.) (U.K.), where plaintiffs sought to recover damages allegedly sustained as a result of deep vein thrombosis ("DVT"). They argued that there was a causal link between air travel and the onset of DVT and that the air carriers' failure to warn passengers of a DVT risk was an Article 17 "accident." The Court of Appeal (Master of the Rolls, Lord Phillips) affirmed the dismissal of the action by the lower court and concluded that a failure to act could not be an "accident" within the context of Article 17:

> A critical issue in this appeal is whether a failure to act, or an omission, can constitute an accident for the purposes of Article 17. Often a failure to act results in an accident, or forms part of a series of acts and omissions which together constitute an accident. In such circumstances it may not be easy to distinguish between acts and omissions. I cannot see, however, how inaction itself can ever properly be described as an accident. It is not an event; it is a non-event. Inaction is the antithesis of an accident.

Id. at ¶ 25, 2003 WL 21353471, at *5-6.

While Lord Phillips correctly addressed the distinction between an event and an omission when addressing DVT and other alleged "accident" cases, he failed to apply the proper standard to the Ninth Circuit's *Husain* decision. *Id.* at ¶¶ 47-50, 2003 WL 21353471, at *9-10. Lord

Phillips neglected to recognize that, once he agreed that the direct cause of Dr. Hanson's death was the smoke and that smoke was not unusual in the cabin, his questioning of the rationale of the decisions below should have caused him to question the judgment. Moreover, Lord Phillips' characterization of the circumstance as an "enforced exposure" to smoke could only have resulted from his misapprehension of the *Husain* record. Lord Phillips overlooked that Dr. Hanson had known for quite some time that this was a smoking flight; that his assigned non-smoking seat was located near the smoking section; that Dr. Hanson chose not to leave his seat until after the meal service; and that the flight attendant specifically advised Ms. Husain that she or Dr. Hanson could try and change seats with another passenger. Thus, application of Lord Phillips' analysis to the facts of this case results in a finding of no "accident."

Respondents also attempt to justify their rejection of the distinction between act and omission by arguing that Articles 20(1) and 25 contemplate defaults or inactions and therefore so must Article 17. R. Brief at 31. However, Articles 20(1) and 25 have no bearing on whether an omission can properly satisfy Article 17. As recognized by Lord Phillips, the scope and purposes of Articles 20(1) and 25 are different and wider than that of Article 17. *Id.* at ¶62, 2003 WL 21353471, at *12.[11]

[11] In *Scherer*, 387 N.Y.S.2d at 581, the court found no "accident" because the injury producing event was sitting in the assigned airline seat. The Solicitor General's support of *Scherer* but later adoption of *Povey v. Civil Aviation Safety Authority and Ors*, [2002] V.S. Ct. 580 (Victoria, Australia, Dec. 20, 2002), *appeal argued*, No. 7223/01 (Victoria C.A. July 28, 2003) ("*Povey*") demonstrates that the Solicitor General has put forth an unworkable "accident" standard. S.G. Brief at 14, 21. *Povey* is incorrect and should be rejected by this Court, just as it has been rejected by both the English Court of Appeal in the DVT Litigation decision and *Rynne v. Lauda-Air Luftfarht Aktiengesellschaft*, D5586/2001 (Dist. Ct. Queensland, Australia, Feb. 7, 2003) (http://www.courts.qld.gov.au/qjudgment/QDC%202003/QDC03-004.pdf), a sister Australian court decision.

In sum, while the conduct of the OLYMPIC AIRWAYS flight attendant may have constituted an omission, it certainly was not the injury producing event. Accordingly, and contrary to the decisions of the courts below, Dr. Hanson's death was not the result of an Article 17 "accident."

II

THE EXCLUSIVITY OF THE WARSAW CONVENTION HAS NO BEARING ON WHETHER THERE HAS BEEN AN "ACCIDENT"

Respondents and the Solicitor General continually return to the propositions that it is unlikely that the Convention signatories intended to relieve the carriers of liability for deaths caused by their misconduct and that such a result is all the more unlikely because the Convention provides the exclusive cause of action. R. Brief at 13, 24, 32, 41-42, 44; S.G. Brief at 28-29. These propositions are without evidentiary support and are contrary to *Tseng* and to the text and drafting history of the treaty.

A. The *Tseng* Exclusivity Ruling Did Not Change The Meaning Of "Accident"

No evidence exists in the text or drafting history of the Convention that the meaning of "accident" is dependent on the Convention's exclusivity, a proposition the Court rejected in *Tseng*. *See Tseng*, 525 U.S. at 171-72. As discussed in OLYMPIC AIRWAYS' Brief, this is a recent argument invoked as justification for rejecting the pre-*Tseng* cases and redefining "accident" to conform to

the common law perception of what is fair. Brief of Petitioner at 28-31. In effect, because state tort law claims have been foreclosed by *Tseng*, the courts below, Respondents and the Solicitor General have re-introduced concepts of negligence into the Convention through a re-definition of an Article 17 "accident." The Convention and the meaning of "accident" cannot properly be viewed through a common law negligence perspective, particularly since re-casting "accident" in negligence terms nullifies the exclusivity recognized by *Sidhu* and *Tseng*.[12] *Sidhu v. British Airways Plc*, [1997] 2 Lloyd's Rep. 76, 1996 WL 1092197, at *84 (H.L.) (U.K.); *Tseng*, 525 U.S. at 173.

Although *Tseng* reaffirmed that the *Saks* definition of "accident" should be flexibly applied, this was not an open invitation to redefine and expand its meaning. As *Saks* cautioned, "[u]ntil Article 17 of the Warsaw Convention is changed by the signatories, it cannot be stretched to impose carrier liability for injuries that are not caused by accidents."[13] 470 U.S. at 406. In fact, the "accident" requirement remains in the Montreal Convention of 1999 to which the United States adhered only last month.[14]

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[12] Indeed, the issue of the Convention's exclusivity had no role in the *Saks* definition of "accident," even though plaintiff argued that her failure to warn claims should go forward independent of the liability provisions of the Convention. *See* Brief for Respondent Valerie Hermien Saks, 1984 WL 565683, at *46. Plaintiff had not properly preserved the issue. 470 U.S. at 408.

[13] The Court in *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 231 (1996) rebuffed a similar argument. *See* Brief of Petitioner at 30.

[14] Convention for the Unification of Certain Rules for Carriage by Air, opened for signature on 28 May 1999, Treaty Doc. 106-45 (ratified by the United States on September 5, 2003 and will enter into force on November 4, 2003).

The fact that a passenger who is unable to satisfy the conditions for liability under the Convention will be left without a remedy may appear harsh when viewed from the common law perspective that every wrong requires a remedy, but this is not a valid basis for redrafting a treaty provision to create liability where none was intended. *See Sidhu*, 1996 WL 1092197, at *87. To embark upon such a path is not the function of the courts and would open the door to reinterpretation of the Convention's other conditions that, if not satisfied, also would foreclose recovery. These treaty conditions include, for example, the requirements for "bodily injury" (Article 17), notice of claim (Article 26) and the period of limitations (Article 29).

The Court should not, as urged by Respondents and the Solicitor General, manipulate the "accident" definition now that the Convention has been found to be exclusive. It is the duty of the courts "to enforce the . . . treaties of the United States, whatever they might be" (*Saks*, 470 U.S. at 406 (quoting *Reed v. Wiser*, 555 F.2d 1079, 1093 (2d Cir. 1977)), rather than manipulate its terms to reach what Respondents and the Solicitor General consider to be a more desired result. *See also Tseng*, 526 U.S at 171 n12; *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134-35 (1989).

B. The Drafters Did Not Intend To Create Liability For Injuries Due To The State Of A Passenger's Health

Respondents acknowledge that one of the primary goals of the Convention was to limit carrier liability and that the Convention's language should be construed in a "manner that fits with the objectives of the treaty as a whole." R. Brief at 13. Respondents nevertheless argue that a balance was struck permitting passengers to "pro-

ceed with claims based on the failure of a carrier to observe governing industry standards" (R. Brief at 42), clearly a common law negligence concept.

While the drafters sought to eliminate the practice in 1929 of air carriers contracting out of any liability, they never intended to impose common law liability on the carriers. *See* Brief of Petitioner at 15-16. The balance struck was presumptive but limited liability in return for not being able to disclaim all liability in the contract of carriage, *provided the conditions of Article 17 were met.*

The drafting history related to Article 17 demonstrates that draft Article 22 (which eventually was divided into Articles 17, 18, 19), as submitted to the Warsaw conference, broadly stated that the "carrier shall be liable for damage sustained during carriage." *See Saks*, 470 U.S. at 401. This broad liability language in the draft, however, was narrowed significantly in the adopted version before the Court (*id.* at 402), which added the liability condition precedent language "accident which caused the damage." This change, coupled with Article 24 (which restricts passenger claims to the conditions and limits set out in the Convention), confirms that it would be improper to broadly equate an Article 17 "accident" with the local common law notions of duty and negligence. *See Tseng*, 525 U.S. at 171. When the Convention intends to refer an issue to local law, it does so expressly. *See, e.g.*, contributory negligence standard (Article 21); damages/beneficiaries (Article 24(2)); calculation of the period of limitations (Article 29).

Importing common law concepts to define the treaty term "accident" would be contrary to the uniformity sought to be achieved by the Convention. Although the Convention was intended to provide "some relief for passengers" (R. Brief at 13), it was only on the condition that the threshold requirements for liability in Article 17

were fulfilled, regardless of fault. Thus, Respondents misapprehend the nature of the balance that was struck by the Convention's drafters and the underlying purpose of the "accident" condition precedent, which is not necessarily met by proof of negligence. *See* R. Brief at 10-11, 22-24, 32-35, 42; S.G. Brief at 23-24.

Finally, Respondents refuse to accept that the post-ratification conduct of the Contracting States is significant for what the States did not do. The Contracting States did not change the meaning of "accident," let alone expand it. R. Brief at 43. The only time Article 17 was significantly broadened was under the never adopted Guatemala City Protocol (1971). *See* Brief of Petitioner at 34. While the trend by the Convention's signatories has been to abandon the limits of liability for passenger injury or death, they have not expanded the basis of air carrier liability under Article 17. The "accident" term in Article 17 has not been amended. In fact, after consideration was given to use of the term "event," both at the 1999 Montreal conference and in the preparatory meetings leading to the conference, the drafters expressly decided to retain the unamended term "accident" "[s]o as not to lose the considerable precedent developed over many years upon the scope of liability created by Article 17 of the Warsaw Convention." ICAO, *III International Conference on Air Law, Montreal, 10-28 May 1999, Preparatory Material*, ICAO Doc. 9775-DC/2 at 65 (1999) (1997 Report of the Rapporteur); *see also id.* at 169-70 (1997 Report of the ICAO Legal Committee).

The signatories to the Warsaw Convention had a clear opportunity to expand the basis of carrier liability in 1999 by replacing the term "accident" with "event." They did not do so. Respondents and the Solicitor General are now asking the Court to do what the treaty signatories have refused to do for nearly 75 years.

CONCLUSION

For the foregoing reasons, the decision and judgment of the Court of Appeals for the Ninth Circuit should be reversed in all respects.

Dated: October 1, 2003

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No. 02-1348 (5)

IN THE

Supreme Court of the United States

OLYMPIC AIRWAYS,

Petitioner,

v.

RUBINA HUSAIN, individually and as personal representative of the estate of Abid M. Hanson, M.D., HANNAH HUSAIN, SARAH HUSAIN, ISAAC HUSAIN, by and through their guardian ad litem RUBINA HUSAIN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED FOR REVIEW

The Warsaw Convention provides the exclusive basis for an air carrier's liability in any action seeking to recover damages for bodily injury or death in international air transportation. The question presented in this case is:

Whether the Warsaw Convention, which imposes air carrier liability only where an "accident" causes passenger death or injury, applies when a passenger's pre-existing medical condition is aggravated by exposure to a normal condition in the aircraft cabin, even if the carrier's negligence was a link in the chain of causation?

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IN THE

Supreme Court of the United States

No. 02-1348

OLYMPIC AIRWAYS,

Petitioner,

v.

RUBINA HUSAIN, individually and as personal representative of the estate of Abid M. Hanson, M.D., HANNAH HUSAIN, SARAH HUSAIN, ISAAC HUSAIN, by and through their guardian ad litem, RUBINA HUSAIN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Air Transport Association of America, Inc. ("ATA"), as *amicus curiae*, supports the position of Petitioner Olympic Airways urging reversal of the decision of the United States Court of Appeals for the Ninth Circuit.[1]

[1] No party to this case had any role in drafting this brief, or provided any monetary support for its preparation or filing. *See* Supreme Court Rule 37.6. The ATA is filing this brief with the consent of both Petitioner and Respondents. Those consents have been filed with the Court.

INTEREST OF *AMICUS CURIAE* AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

The ATA is an association of 22 U.S. and five foreign airlines.[2] The ATA's U.S. members operate within the United States and in the U.S. foreign commerce. Its foreign members also participate in the U.S. foreign commerce and are subject to suit in the United States. A principal purpose of the ATA is to support its member airlines by promoting airline safety and advocating common industry positions on important policy and legal issues. Since its inception in 1936, the ATA has been involved in the development of international law governing international air transportation.

The decision below threatens to upset the established expectations of air carriers and governments about the operation of the treaty-based liability regime governing international air transportation, commonly known as the Warsaw Convention.[3] The decision below improperly

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[2] The ATA's member airlines are: Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, ATA Airlines (formerly American Trans Air), Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Forwarding, Evergreen International Airlines, FedEx Corporation, Hawaiian Airlines, JetBlue Airways, Midwest Airlines (formerly Midwest Express Airlines), Northwest Airlines, Polar Air Cargo, Southwest Airlines, United Airlines, United Parcel Service, and US Airways. Associate members are: AeroMéxico, Air Canada, Air Jamaica, KLM-Royal Dutch Airlines, and Mexicana de Aviación.

[3] In this brief, all references to articles of the Waresaw Convention are to the Convention as amended by Montreal Protocol No. 4, as it is currently in effect for the United States. The text of the amended Convention, as published by the U.S. Senate Foreign Relations Committee, appears in the Appendix to this brief. The international air carrier liability regime comprises three documents at this writing:

imposes common-law duty-based negligence principles on the definition of a compensable "accident" under Article 17 of the Warsaw Convention. It therefore undermines the uniformity and exclusivity of air carrier liability under the Convention that this Court's decision in *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999), requires, and contradicts the non-fault-based meaning of "accident," which this Court adopted in *Air France v. Saks*, 470 U.S. 392 (1985). The courts below incorrectly applied common law jurisprudence to this treaty-based legal regime by expanding the definition of "accident" in *Saks* beyond recognizable form. Contrary to the suggestion of the District Court, *Tseng* was not an instruction to the lower courts to expand *Saks*, *see Husain v. Olympic Airways*, 116 F. Supp. 2d 1121, 1135 n.11 (N.D. Cal. 2000), Petitioner's Appendix[4] at 58a n.11, and the ATA urges the Court to reverse the attempt of the lower courts to do so.

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(1) Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 40105 (note) (2000) (hereafter "Warsaw Convention" or "Convention"); (2) Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, done at The Hague, Sept. 28, 1955, S. Treaty Doc. 107-14; and (3) Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929 as amended by the Protocol done at The Hague on September 28, 1955, Sept. 25, 1975, *reprinted in* S. EXEC. REP. NO. 105-20, at 21-32 (1998) (hereafter "MP4"). The United States currently is party only to documents 1 and 3, the original Warsaw Convention and MP4. MP4 entered into force for the United States on March 4, 1999. The Hague Protocol has been resubmitted recently to the Senate for its advice and consent to ratification.

[4] Hereafter citations to the Appendix filed by Petitioner Olympic Airways are cited as "Pet. App. at ___."

STATEMENT OF THE CASE

This case addresses the liability of Olympic Airways for the death of its passenger, Dr. Abid M. Hanson, during an international flight from Athens, Greece to New York. Dr. Hanson's survivors allege that he died as a result of an asthma attack caused by exposure to cigarette smoke in the passenger cabin of the aircraft during the flight, which lawfully allowed smoking in designated places. *See Husain v. Olympic Airways*, 316 F.3d 829, 831-32 (9th Cir. 2002), Pet. App. at 3a.

The evidence at trial established that Dr. Hanson had a prior history of asthma and suffered from severe food allergies before his death. *See id.* at 832-33, Pet. App. at 4a-5a. At the airport, he or a family member requested that he be assigned a seat in the non-smoking section of the aircraft. *See id.* at 833, Pet. App. at 6a. Upon boarding the plane, Dr. Hanson and his family realized that he was assigned to a non-smoking row close to the smoking section, and his wife asked a flight attendant to reassign him to a non-smoking seat further away from the smoking section. *See id.* The flight attendant refused. Before the airplane took off, Dr. Hanson's wife asked again that he be moved to a different seat, but was rebuffed once again even though there were other non-smoking seats available. *See id.* at 833-34 n.5, Pet. App. at 6a-7a n.5.

Shortly after the airplane took off in Athens, passengers in the smoking section began to smoke, and the smoke began to bother Dr. Hanson. *See id.* at 834, Pet. App. at 7a. His wife again asked the same flight attendant to move him, but the attendant again refused to do so because the plane was full. *See id.* The flight attendant did grant Dr. Hanson's wife the option of asking other

passengers if they would switch seats with him. *See id.* Neither Dr. Hanson, his wife, nor any other of their several traveling companions ever used this option. *See Husain*, 116 F. Supp. 2d at 1126, Pet. App. at 40a. Later, assisted by a traveling companion who was an allergist, Dr. Hanson was given at least two shots of allergy medication, after which he collapsed and stopped breathing. *See id.* He was then given cardio-pulmonary resuscitation and oxygen. *See Husain*, 316 F.3d at 834, Pet. App. at 8a. Despite these efforts, Dr. Hanson died on the aircraft. *See id.*

Dr. Hanson's surviving family members filed this action against Olympic Airways in a California state court to recover damages resulting from his death. *See id.* at 832, Pet. App. at 3a. They alleged that Olympic Airways was liable for his death under the Warsaw Convention. Olympic Airways timely removed the action to the United States District Court for the Northern District of California. *See id.*

Following a three-day bench trial, the District Court issued its findings of fact and conclusions of law, and later made technical corrections to those findings. Pet. App. at 32a-80a (reported at 116 F. Supp. 2d 1121 (N.D. Cal. 2000)). The District Court recognized the binding precedent from this Court that the death of a passenger during international air transportation is compensable only if it is caused by an "accident." *See id.* at 1130, Pet. App. at 49a (citing *Saks*, 470 U.S. at 396). Although the District Court found that smoke exposure during the flight was a primary cause of Dr. Hanson's death, *see id.* at 1128, Pet. App. at 43a-44a, the court held that the flight attendant's failure to comply with his wife's requests to assign him to a different seat was an "accident" under Article 17 of the Warsaw Convention which proximately caused his death.

See id. at 1135, Pet. App. at 58a-60a. The District Court also found that the flight attendant's refusal to reassign Dr. Hanson to another non-smoking seat constituted "wilful misconduct" under Article 25 of the Warsaw Convention, thereby exposing the airline to unlimited liability.[5] *See id.* at 1139, Pet. App. at 67a. Following the issuance of supplemental findings of fact and conclusions of law, *see* Pet. App. at 23a-31a, Olympic Airways timely appealed to the United States Court of Appeals for the Ninth Circuit. *See Husain*, 316 F.3d at 832, Pet. App. at 4a.

The Court of Appeals affirmed the District Court's holding that Dr. Hanson's death was caused by an Article 17 "accident." Pet. App. at 1a-21a (reported at 316 F.3d 829 (9th Cir. 2002)). The court specifically found that the flight attendant's failure to move Dr. Hanson's seat violated Olympic Airways' procedures and was an "accident" under Article 17. *See id.* at 837, Pet. App. at 14a. In language reminiscent of the balancing test for a fault-based negligence standard developed by Judge Learned Hand,[6]

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[5] The ATA notes that its members have waived the limits of liability without the Article 25 finding of "wilful misconduct" required by the text of the Convention.

[6] See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947):

> [T]he owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL.

Id.

the Court of Appeals explained that the "failure to act in the face of a known, serious risk satisfies the meaning of 'accident' within Article 17 so long as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane." *Id.*

Regarding causation, the Court of Appeals found that "the exposure to smoke and failure to move Dr. Hanson" was a sufficient "link in the chain" of causation to subject the airline to liability for his death. *Id.* at 838, Pet. App. at 16a-17a (quoting *Saks*, 470 U.S. at 406). The Court of Appeals also affirmed the District Court's finding that Dr. Hanson's death was proximately caused by the "wilful misconduct" of Olympic Airways under Article 25, stating that the flight attendant's "failure to take action, either by moving Dr. Hanson or by notifying [her supervisor] of [his wife's] request to have her husband moved, was willful misconduct." *Id.* at 840, Pet. App. at 19a.

Following the decision from the Court of Appeals, Olympic Airways timely petitioned for a writ of *certiorari* from this Court. The Court granted that petition on May 27, 2003.

SUMMARY OF ARGUMENT

The decisions of the courts below are at odds with the treaty-based liability regime governing international air transportation, commonly known as the Warsaw Convention. The ATA urges this Court to find as a matter of law that the Convention does not provide a remedy when a passenger's pre-existing medical condition is aggravated by exposure to a normal condition in the aircraft cabin, regardless of whether the air carrier failed to minimize or

prevent the aggravation of the passenger's pre-existing medical condition. Two reasons support reversal:

First, the airline's failure to assign Dr. Hanson a different seat did not cause his death; therefore, it cannot be the basis for liability under this Court's interpretation of Article 17 of the Warsaw Convention in *Saks*.

Second, and more fundamentally, by imposing common law negligence theories of liability on international air transportation, the decisions of the courts below contravene this Court's instruction in *Tseng* that the Warsaw Convention is the exclusive remedy for passengers injured during international air transportation. Allowing this decision to stand will contradict the Court's decision in *Tseng* and render it meaningless. Contrary to the suggestion by the District Court below, and affirmed by the Court of Appeals, *Tseng* was not an instruction to the lower courts to expand the *Saks* definition of "accident" by imposing onto it modern common law concepts of duty, foreseeability, and fault.

ARGUMENT

1. The Warsaw Convention establishes a comprehensive liability system for the compensation of passengers without regard to the fault of the airline. Many of the world's airlines, including ATA-member airlines, have waived their limits of liability and certain defenses.[7]

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[7] The Warsaw Convention authorizes airlines to agree to additional liabilities by "special contract." Warsaw Convention, art. 22. The U.S. Department of Transportation has approved the intercarrier agreement by which ATA-member airlines waived their liability limit for death of or bodily injury to passengers and waived the "all necessary measures" defense of Article 20 for claims up to a certain liability amount. *See* Docket No. OST-96-1607, Order 97-1-2, 1997 DOT Av. LEXIS 2 (D.O.T. Jan. 8, 1997). Major foreign air carriers have taken similar action.

As such, the Convention provides the exclusive basis for the claim of a passenger seeking a remedy from an airline for any personal injury or death occurring during international air transportation. *See Tseng*, 525 U.S. at 161. This Court has held specifically that "recovery for a personal injury suffered on board an aircraft or in the course of any of the operations of embarking or disembarking . . . if not allowed under the Convention is not available at all." *Id.* (internal quotations and alterations omitted).

In *Tseng*, the Court construed Article 17 of the Convention, which controls the imposition of liability for personal injury or death suffered by a passenger. *See id.* Article 17 provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, *if the accident which caused the damage so sustained* took place on board the aircraft or in the course of the operations of embarking or disembarking.[8]

Warsaw Convention, art. 17 (emphasis added).

Chapter III of the Warsaw Convention, in which Article 17 is found, imposes a specific and carefully constructed process for determining the liability of an air carrier to its passengers. A carrier is presumptively liable if a claim is

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[8] Quotations from the Warsaw Convention included in this brief are to the official English translation of the Convention. *See* 49 Stat. 3014-3023, *reprinted in* 49 U.S.C. § 40105 (note) (2002). The governing text of the Convention is written in French.

timely filed and the passenger can establish the three elements required by Article 17: (1) death or bodily injury, (2) caused by an accident, and (3) which occurred when the passenger was on board the aircraft, or embarking or disembarking from it. From this strong presumption of liability, the Convention confers on the carrier two limited defenses: the carrier can prove (1) that it took all necessary measures to avoid the damage or that it was impossible to take such measures (Article 20), or (2) that negligence of the passenger caused or contributed to the damage, such that the carrier may be exonerated wholly or partly from his liability (Article 21). In this way, the Convention confers on claimants the benefits of a presumption of liability once they show that an "accident" caused "death or bodily injury" while on board, or embarking or disembarking from, an aircraft. This aspect of the legal regime is a significant advantage to claimants. In return, carriers are given certain limits on their liability. And, as *Tseng* teaches, a carrier is not liable for personal injury if the Article 17 criteria cannot be established. Regardless of how cleverly the plaintiff describes or styles his claim, following *Saks* and *Tseng*, when the plaintiff does not allege or cannot prove that the passenger's injury or death resulted from an accident, a court errs in holding the airline liable for the passenger's injury or death.[9]

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[9] As the British House of Lords has aptly explained in foreshadowing this Court's decision in *Tseng*, "[t]o permit exceptions, whereby a passenger could sue outwith the Convention for losses sustained in the course of international carriage by air, would distort the whole system, even in cases for which the Convention did not create any liability on the part of the carrier." *Sidhu v. British Airways*, [1997] A.C. 430 (H.L. 1996).

The established definition of an "accident" under Article 17, which is now accepted world-wide,[10] comes from this Court's seminal 1985 decision in *Saks*. In *Saks*, this Court defined "accident" to be "an unexpected or unusual event or happening that is external to the passenger," and specifically limited the definition to exclude injury that "indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." *Saks*, 470 U.S. at 405, 406.

This Court made clear in *Saks* that liability under Article 17 arises only if the "accident" *causes* the passenger's injury or death. *See id.* at 396. Under *Saks*, an "accident" is an event that occurs independently of the passenger. Explaining this definition, in *Saks*, the Court cited with approval the holdings of lower courts that the following incidents are not "accidents" within the meaning of the Convention: sitting in an airline seat during a normal flight, which aggravated a hernia despite the airline's failure to move the passenger's seat, *Abramson v. Japan Airlines Co.*, 739 F.2d 130 (3d Cir. 1984); fainting while waiting in the terminal for one's baggage, *MacDonald v. Air Can.*, 439 F.2d 1402 (1st Cir. 1971); and sitting in an airplane seat during a normal flight, which aggravated thrombophlebitis, *Scherer v. Pan Am. World Airways, Inc.*, 387 N.Y.S.2d 580 (N.Y. App. Div. 1976). *See Saks*, 470 U.S. at 404-05. Following *Saks*, courts have properly held that the following injuries have not been caused by an "accident": swollen legs from sitting in an airplane seat, *Toteja v. British Airways PLC*, No. JFM-99-815, 1999 WL 1425399 (D. Md. July 20, 1999); and a back injury from

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[10] *See, e.g., Morris v. KLM Royal Dutch Airlines*, [2002] 2 A.C. 628, ¶ 71 (H.L. 2002).

sitting in a seat for a prolonged period of time, *Margrave v. British Airways*, 643 F. Supp. 510, 511 (S.D.N.Y. 1986).

The facts here – aggravation of a pre-existing asthmatic condition by a normal and expected condition on the aircraft leading to a passenger's death – fit squarely into this line of cases. The full holding of *Saks* made clear that issues of crew negligence are not relevant because the "accident" inquiry focuses solely on the "nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury." *Saks*, 470 U.S. at 406-07. For these reasons, as a matter of law, Olympic Airways' failure to reassign Dr. Hanson's seat did not cause his death and the airline cannot be liable under the Warsaw Convention.

The courts below improperly weaved foreseeability and duty concepts into the *Saks* "accident" definition to support the conclusion that failure to comply with industry standards constitutes a sufficient "unexpected or unusual event or happening" to find an Article 17 accident. *Husain*, 316 F.3d at 837, Pet. App. at 14a-15a; *Husain*, 116 F. Supp. 2d at 1132-33, Pet. App. at 51a-52a. But *Saks* rejected a rationale similar to that accepted by the courts below. In *Saks*, the plaintiff alleged that her permanent deafness was caused by the airline's failure to properly maintain and operate the aircraft's pressurization system. *See Saks*, 470 U.S. at 394. Because there was no evidence of any malfunction, the Court addressed only the narrow issue of whether a plaintiff can meet its burden by showing that her injury was caused by the normal operation of the aircraft's pressurization system. As the Court stated, "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot

apply." *Id.* at 406. Here, as in *Saks*, the aircraft operated normally. Thus, regardless of whether Olympic Airways may have been negligent in failing to move Dr. Hanson, that failure did not cause his allergic or asthmatic reaction to the cigarette smoke,[11] and consequently Olympic Airways cannot be liable under the Convention.

In *Saks*, this Court provided important guidance to the lower courts when it stated:

> Any injury is the product of a chain of causes, and we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger. *Until Article 17 of the Warsaw Convention is changed by the signatories, it cannot be stretched to impose liability for injuries that are not caused by accidents.*

Id. (emphasis added). The court below failed to adhere to this guidance, and should therefore be reversed.

2. Two of this Court's holdings from important Warsaw Convention cases control the outcome in this case:

- The Warsaw Convention provides the exclusive basis for air carrier liability to a passenger claiming personal injury or death arising from international air transportation. *See Tseng*, 525 U.S. at 161.

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[11] Indeed, it is undisputed that Dr. Hanson's smoke allergy was pre-existing, and the courts below found that the allergy caused his death. *See Husain*, 116 F. Supp. 2d at 1130, Pet. App. at 47a (finding that "Dr. Hanson's death was the result of respiratory distress which was caused by an exacerbation of his asthmatic condition").

- For an air carrier to be held liable, there must be "an unexpected or unusual event or happening that is external to the passenger" that caused the passenger's personal injury or death. *Saks*, 470 U.S. at 405.

Here, the plaintiffs alleged no "accident" as that term is defined by *Saks* or otherwise commonly understood. Instead, they alleged that the air carrier *failed to prevent* the passenger's internal "reaction to the usual, normal, and expected operation of the aircraft" based upon the airline's knowledge that it was foreseeable that the passenger would have such an internal reaction. The plaintiffs further alleged, and the courts below found, that the airline failed to follow both industry standards[12] and its own company standards, and that these omissions constituted "accidents" under Article 17.

The courts below employed a modern, U.S.-developed, common law approach to liability, rather than adhering to the agreed international treaty-based liability regime framed in the Warsaw Convention. In doing so, they engaged in a form of creative jurisprudence that is alien to the Convention's goal of worldwide uniformity among diverse legal systems. Their holdings threaten to undermine the exclusivity and uniformity mandated by the

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[12] Apart from the fact that negligence-based liability is irrelevant in determining whether an "accident" has occurred under the Warsaw Convention, permitting an accident to be defined by reference to current industry standard will discourage airlines from undertaking efforts to protect passengers or to prevent foreseeable injuries. If airlines are going to be held liable to their passengers for failing to heed to a passenger's request to move seats based upon vague assertions of allergies, the standard in the industry will become simply to make no effort to do so.

Convention and to overrule this Court's decision in *Tseng*.

Both courts below focused on duty, industry standard of care, and foreseeability, all of which are negligence-based concepts developed by common law jurisprudence. Modern common law theories of liability that have developed in this country cannot be read into this international convention, which was fixed, for the sake of certainty and uniformity, when the negotiating States reached agreement on the Convention. *See, e.g., Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 544 & n.10 (1990) (rejecting the suggestion that liability could be imposed on an airline solely for an emotional injury in part because that injury has only become compensable in modern times). In *Tseng*, which held that the Warsaw Convention provides the exclusive remedy for a passenger injured during an international flight, this Court specifically held that the Convention operates exclusive of state law.[13] That exclusive liability scheme created by the Convention is fixed unless and until it is modified by the mutual agreement of the signatory nations. The courts below therefore erred in imposing this modern, extra-treaty legal construct on the Convention.

This Court has recognized that the cardinal purpose of the Warsaw Convention is to "achieve uniformity of rules governing claims arising from international air transportation." *Tseng*, 525 U.S. at 169-70; *See also Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 230 (1996); *Floyd*, 499 U.S. at 552. As explained in *Tseng*, the Convention balances the interest of the passenger seeking to recover damages for injuries or death against the

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[13] The Court reasoned that "[r]ecourse to local law . . . would undermine the uniform regulation of international carrier liability that the Warsaw Convention was designed to foster." *Tseng*, 525 U.S. at 161.

interest of the carrier seeking uniform, predictable liability rules.[14] Thus, carriers gain from the limitation of liability, but passengers benefit from the "clear presumption of liability, which eliminated the difficult task of proving fault on the part of the carrier."[15] *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1489 (D.C. Cir. 1991); *see also In re Air Disaster at Lockerbie, Scot. on Dec. 21, 1988*, 928 F.2d 1267, 1271 (2d Cir. 1991).

The focus of the courts below on the failure of Olympic Airways to change Dr. Hanson's seat and its failure to follow industry standards to satisfy the "accident"

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[14] *See Tseng*, 525 U.S. at 170. Before the Warsaw Convention was adopted, air carriers in civil law countries (the vast majority of the signatory States) were permitted contractually to disclaim liability for passenger injury or death. *See generally* SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, OCT. 4-12, 1929, WARSAW CONVENTION MINUTES (R. Horner & D. Legrez transl. 1975). The drafting history of the Convention therefore reflects the drafters' compromise with respect to passengers, between no liability and exposure to unlimited liability. *See id.* at 47-48.

[15] As Lord Hope of the British House of Lords recently explained:

> From the point of view of the passenger or the owner of baggage or cargo, the imposition of liability without proof of fault on the carrier and the nullification of provisions relieving him of liability or restricting the amount of his liability are very significant advantages. From the point of view of the carrier too however there are significant advantages in the system laid down by the Convention. A principal consequence of that system is the exposure of the carrier to liabilities without the freedom to contract out of them. But it defines those situations in which compensation is to be available, and it sets out the limits of liability and the conditions under which claims to establish liability, if disputed, are to be made. *A balance has been struck between these competing interests, in the interests of certainty and uniformity.*

Morris, [2002] 2 AC 628, ¶ 66 (emphasis added).

requirement was incorrect and contrary to the structure of the Convention. The question (or existence) of carrier fault simply is not relevant in the first instance in determining whether the liability presumption of Article 17 arises. The sole proper inquiry is into "the nature of the event which *caused* the injury," *Saks*, 470 U.S. at 407. Here, it was Dr. Hanson's own internal reaction to the normal conditions of this flight which caused the injury. The court's inquiry into the care taken by the air carrier to avert the alleged injury during the normal and expected operation of an international flight was improper and it was this inquiry alone that led it to impose liability.

The courts below essentially equated the term "accident" with "negligence," which is not what the United States agreed to in the Convention and does not fit within the definition given by this Court in *Saks*. In contrast, the Eleventh Circuit in *Krys v. Lufthansa German Airlines* got it right, noting that "[h]aving provided for a defense turning on the absence of negligence, we think it unlikely that the drafters intended that the initial 'accident' inquiry be resolved by reference to negligence." 119 F.3d 1515, 1522 (11th Cir. 1997). The decision from the Court of Appeals below accepting the plaintiffs' argument that "[b]ecause [the flight attendant's] conduct was negligent, it fits the definition of accident under Article 17," *Husain*, 316 F.3d at 836, Pet. App. at 12a, is therefore incorrect.[16]

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[16] *Husain*, 316 F.3d at 836, Pet. App. at 12a. The District Court also reached a similar incorrect conclusion by relying improperly on a negligence standard when it held that "[t]he negligent failure of the flight crew to appropriately serve the needs of an ailing passenger can be considered an 'accident' under the Convention." *Husain*, 116 F. Supp. 2d at 1131, Pet. App. at 50a.

In an earlier case (decided after the District Court's decision here

The leading pre-*Saks* case involving the proper definition of "accident" - which this Court cited with approval in *Saks* - is *Abramson v. Japan Airlines, Co., Ltd.*, 739 F.2d 130 (3d Cir. 1984). There, the Third Circuit held that the airline's alleged aggravation of a pre-existing injury during the course of a normal flight was not an Article 17 "accident" despite the flight crew's refusal to aid the passenger. In *Abramson*, the passenger claimed - as the plaintiffs did here - that the refusal to aid him was "unusual and unexpected" and thus an Article 17 "accident." *Id.* at 132. The Third Circuit properly found that absent "proof of abnormal external factors, aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an 'accident' within the meaning of Article 17." *Id.* at 133.

Contrary to the instruction from this Court in *Saks* and the proper application of the definition of accident in *Krys* and *Abramson*, the courts below incorrectly shifted the focus of the "accident" requirement from an inquiry into the nature of the event that caused the injury (*i.e.*, inhalation of cigarette smoke on a smoking flight) to the care that the air carrier allegedly could have taken to avert the injury. This Court, however, made clear in *Saks* that the focus of the "accident" inquiry is into the nature of the event that caused the injury, and not the care taken by the airline to avert the injury. *See Saks*, 470 U.S. at 407. The "accident" standard that the courts below applied misconstrues the nature of the liability created by the Warsaw Convention by

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but before the Court of Appeals decision), the Ninth Circuit properly applied the Convention when it explained that the definition of "accident" makes "no mention of the carrier's motive or mental state whatsoever." *Carey v. United Airlines*, 255 F.3d 1044, 1048 (9th Cir. 2001). The holding of the Court of Appeals in this case conflicts with its own precedent.

improperly focusing the "accident" inquiry on reasonableness, alternatives, foreseeability, and industry standards. However, neither the Convention, *Saks*, *Krys*, nor *Abramson* permits a court to premise its inquiry into the "accident" based on a perception of the risk, reasonable alternatives to avoid the risk, or the expense of minimizing the risk.

In holding the airline liable for Dr. Hanson's death and ordering that the airline pay $1,400,000 in damages to his family, the courts below held that an airline's failure to prevent a passenger's internal reaction to a normal and lawful condition on a flight constitutes a compensable accident under the Warsaw Convention. The flight attendant's failure to move Dr. Hanson at his wife's request constitutes nothing more than an omission - the flight attendant did not *do* anything and there was no "event" or "happening." Under *Saks*, such an omission cannot be an Article 17 "accident." While a pure omission can *cause* an "accident," it cannot *be* the "accident." When an airline fails to do something that the plaintiff claims it should have done, such as reassign a passenger's seat, no "event" or "happening" has occurred. The evidence at trial established that nothing happened during this ordinary and unremarkable flight that involved the actions of anyone except for the passenger himself and his atypical reaction to a normal and otherwise unremarkable flight.

Quite simply, a failure to take action to prevent a passenger's internal reaction to a normal condition - whether known by the airline's employees or not - is not an "event" or "happening" and is therefore outside the scope of the *Saks* definition of an Article 17 accident. Neither court below made any finding that the ambient smoke in the passenger cabin was anything other than a "normal" and

"expected" condition on the flight. Under *Saks*, the presence of normal, expected conditions takes this case outside the scope of those that are compensable under the Warsaw Convention.[17]

Allowing a court to engage in a form of jurisprudence applied in the United States but not in all signatory States will lead directly to the result the Convention was intended to avoid, that is, the application throughout the world of numerous and diverse tests of liability based on the substantive law of the forum chosen by the plaintiff.[18] Neither the District Court nor the Court of Appeals, both part of the third branch of government, has the power to change unilaterally the Convention language agreed to by the Executive Branch and consented to by the Senate under Article II, Section 2 of the U.S. Constitution.[19]

Finally, the United States and other countries have drafted a new treaty to replace the Warsaw Convention that preserves the basic liability regime of the Warsaw

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[17] Plaintiffs presented no evidence at trial that anything happened in the course of the flight that adversely affected the performance or flight characteristics of the aircraft, that the systems affecting the passenger cabin environment were in any condition other than their normal working order, or that the aircraft and its flight crew did not comply with all applicable aviation regulations.

[18] Under the Warsaw system, it is the procedural law only, never the substantive law, that the forum court controls. *See* Warsaw Convention, art. 28(2) ("Questions of procedure shall be governed by the law of the court to which the case has been submitted.").

[19] This section of the U.S. Constitution grants the Executive, not district court or court of appeals judges, the "Power, by and with the Advice and Consent of the Senate, to make Treaties." U.S. Const. art. II, § 2.

system. This new agreement, known as the 1999 Montreal Convention,[20] is pending before the Senate for its advice and consent to ratification. It preserves without change the requirement of Article 17 that an "accident" occur before a passenger can recover from an air carrier for personal injury or death.[21] The preservation of this requirement, together with its uniform worldwide legal interpretation, was an essential ingredient in securing the agreement of parties to lift the Warsaw monetary liability limits. Upon its entry into force, the 1999 Montreal Convention will supersede the Warsaw Convention and will codify the airlines' contractual waivers of their liability limits.

As the Court in *Tseng* specifically made clear, "Postratification adjustments . . . are appropriately made by the treaty's signatories," not the courts. *Tseng*, 525 U.S. at 673 n.12. The drafters of the 1999 Montreal Convention have confirmed that the accident requirement as defined by *Saks* remains a necessary prerequisite for awarding damages for death or injury under the Warsaw Convention. The ATA urges the Court to reverse the efforts by the courts below to make improper postratification adjustments to the Warsaw Convention.

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[20] *See* Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, ICAO Doc. 9740, S. Treaty Doc. No. 106-45 ("1999 Montreal Convention"). The Senate Committee on Foreign Relations held a hearing just three weeks ago on the 1999 Montreal Convention. *See* United States Aviation Policy: The Montreal Convention and The Hague Protocol, Hearing on Aviation and Environment Treaties Before the Senate Comm. on Foreign Relations, 108th Cong. D.674 (June 17, 2003).

[21] 1999 Montreal Convention, art. 17.

CONCLUSION

For the foregoing reasons, the Air Transport Association of America, Inc. as *amicus curiae* urges the Court to reverse the decision of the United States Court of Appeals for the Ninth Circuit. This Court should hold as a matter of law that the occurrence of an "accident," which is a condition precedent to air carrier liability under Article 17 of the Warsaw Convention, is not satisfied when a passenger's pre-existing medical condition is aggravated by exposure to a normal condition in the aircraft cabin, even if the air carrier negligently fails to prevent the aggravation of the passenger's pre-existing medical condition.

Respectfully submitted,

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THE PROVISIONS OF THE REVISED WARSAW CONVENTION APPLICABLE TO THE UNITED STATES IN THE EVENT OF RATIFICATION OF MONTREAL PROTOCOL NO.4[1]

Excerpt from Senate Executive Report 105-20 (August 25, 1998)

CHAPTER I. SCOPE-DEFINITIONS

Article 1

1. This Convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise. (W-Art. 1)

2. For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention. (H-Art. I)

3. Carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the

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[1] Margin notes give the source of the provision (W = Warsaw Convention; H = The Hague Protocol).

parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State. (H-Art. I)

Article 2

1. This Convention shall apply to transportation performed by the State or by legal entities constituted under public law provided it falls within the conditions laid down in Article 1. (W-Art. 2)

2. In the carriage of postal items the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations. (M4-Art. II)

3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items. (M4-Art. II)

CHAPTER II. TRANSPORTATION DOCUMENTS

SECTION I. PASSENGER TICKET

Article 3

1. In respect of the carriage of passengers a ticket shall be delivered containing:

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage. (H-Art. III)

2. The passenger ticket shall constitute prima facie evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1(c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22. (H-Art. III)

SECTION II. BAGGAGE CHECK

Article 4

1. In respect of the carriage of registered baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a passenger ticket which complies with the provisions of Article 3, paragraph 1, shall contain:

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

c) a notice to the effect that if the carriage involves an ultimate destination or stop in a country other than the

country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or damage to baggage.

2. The baggage check shall constitute prima facie evidence of the registration of the baggage and of the conditions of the contract of carriage. The absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if the carrier takes charge of the baggage without a baggage check having been delivered or if the baggage check (unless combined with or incorporated in the passenger ticket which complies with the provisions of Article 3, paragraph 1(c)) does not include the notice required by paragraph 1(c) of this Article, he shall not be entitled to avail himself of the provisions of Article 22, paragraph 2. (H-Art. IV)

SECTION III. DOCUMENTATION RELATING TO CARGO

Article 5

1. In respect of the carriage of cargo an air waybill shall be delivered.

2. Any other means which would preserve a record of the carriage to be performed may, with the consent of the consignor, be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a receipt for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means.

3. The impossibility of using, at points of transit and destination, the other means which would preserve the record of the carriage referred to in paragraph 2 of this

Article does not entitle the carrier to refuse to accept the cargo for carriage. (M4-Art. III)

Article 6

1. The air waybill shall be made out by the consignor in three original parts.

2. The first part shall be marked "for the carrier"; it shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier and handed by him to the consignor after the cargo has been accepted.

3. The signature of the carrier and that of the consignor may be printed or stamped.

4. If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor. (M4-Art. III)

Article 7

When there is more than one package:

a) the carrier of cargo has the right to require the consignor to make out separate air waybills;

b) the consignor has the right to require the carrier to deliver separate receipts when the other means referred to in paragraph 2 of Article 5 are used. (M4-Art. III)

Article 8

The air waybill and the receipt for the cargo shall contain:

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place; and

c) an indication of the weight of the consignment. (M4-Art. III)

Article 9

Non-compliance with the provisions of Articles 5 to 8 shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability. (M4-Art. III)

Article 10

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by him or on his behalf in the air waybill or furnished by him or on his behalf to the carrier for insertion in the receipt for the cargo or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 5.

2. The consignor shall indemnify the carrier against all damage suffered by him, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on his behalf.

3. Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by him, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on his behalf in the receipt for the cargo or in the record preserved by the other means referred to in paragraph 2 of Article 5. (M4-Art. III)

Article 11

1. The air waybill or the receipt for the cargo is *prima facie* evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.

2. Any statements in the air waybill or the receipt of the cargo relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are *prima facie* evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the cargo. (M4-Art. III)

Article 12

1. Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

2. If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

3. If the carrier obeys the orders of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the receipt for the cargo delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage

which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the receipt for the cargo.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the cargo, or if he cannot be communicated with, the consignor resumes his right of disposition. (M4-Art. III)

Article 13

1. Except when the consignor has exercised his right under Article 12, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to him, on payment of the charges due and on complying with the conditions of carriage.

2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage. (M4-Art. III)

Article 14

The consignor and the consignee can respectively enforce all the rights given them by Articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract of carriage. (M4-Art. III)

Article 15

1. Articles 12, 13 and 14 do not affect either the relations of the consignor and the consignee with each other or the

mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2. The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air waybill or the receipt for the cargo. (M4-Art. III)

Article 16

1. The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, octroi or police before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, his servants, or agents.

2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents. (M4-Art. III)

CHAPTER III. LIABILITY OF THE CARRIER

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. (W-Art. 17)

Article 18

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, any registered baggage, if the occurrence which caused the damage so sustained took place during the carriage by air.

2. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon

condition only that the occurrence which caused the damage so sustained took place during the carriage by air.

3. However, the carrier is not liable if he proves that the destruction, loss of, or damage to, the cargo resulted solely from one or more of the following:

a) inherent defect, quality or vice of that cargo;

b) defective packing of that cargo performed by a person other than the carrier or his servants or agents;

c) an act of war or an armed conflict;

d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.

4. The carriage by air within the meaning of the preceding paragraphs of this Article comprises the period during which the baggage or cargo is in the charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

5. The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. (M4-Art. IV)

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods. (W-Art. 19)

Article 20

In the carriage of passengers and baggage, and in the case of damage occasioned by delay in the carriage of cargo, the carrier shall not be liable if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures. (M4-Art. V)

Article 21

1. In the carriage of passengers and baggage, if the carrier proves that the damage was caused by or contributed to by the negligence of the person suffering the damage the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

2. In the carriage of cargo, if the carrier proves that the damage was caused by or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he derives his rights, the carrier shall be wholly or partly exonerated from his liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. (M4-Art. VI)

Article 22

1. In the carriage of persons the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand francs. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed two hundred and fifty thousand francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability. (H-Art. XI)

2. a) In the carriage of registered baggage, the liability of the carrier is limited to the sum of two hundred and

fifty francs per kilogram, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum, not exceeding the declared sum, unless he proves that the sum is greater than the passenger's or consignor's actual interest in delivery at destination. (H-Art. XI; M4-Art. VII)

b) In the carriage of cargo, the liability of the carrier is limited to a sum of 17 Special Drawing Rights per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case, the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the consignor's actual interest in delivery at destination. (M4-Art. VII)

c) In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of the other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability. (H-Art. XI)

3. As regards objects of which the passenger takes charge himself the liability of the carrier is limited to five thousand francs per passenger. (H-Art. XI)

4. The limits prescribed in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later. (H-Art. XI)

5. The sums mentioned in francs in this Article shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment. (H-Art. XI)

6. The sums mentioned in terms of the Special Drawing Right in this Article shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgment. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions. The value of

a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that High Contracting Party.

Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 2(b) of Article 22 may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier in judicial proceedings in their territories is fixed at a sum of two hundred and fifty monetary units per kilogramme. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. This sum may be converted into the national currency concerned in round figures. The conversion of this sum into the national currency shall be made according to the law of the State concerned. (M4-Art. VII)

Article 23

1. Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention. (W-Art. 23, designated as para. 1 by H-Art. XII)

2. Paragraph 1 of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried. (H-Art. XII)

Article 24

1. In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons

who have the right to bring suit and what are their respective rights.

2. In the carriage of cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability. (M4-Art. VIII)

Article 25

In the carriage of passengers and baggage, the limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment. (M4-Art. IX)

Article 25A

1. If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22. (H-Art. XIV)

2. The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits. (H-Art. XIV)

3. In the carriage of passengers and baggage, the provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result. (M4-Art. X)

Article 26

1. Receipt by the person entitled to the delivery of baggage or goods without complaint shall be prima facie evidence that the same have been delivered in good condition and in accordance with the document of transportation. (W-Art. 26)

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have [has] been placed at his disposal. (H-Art. XV)

3. Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid. (W-Art. 26)

4. Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part. (W-Art. 26)

Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this convention against those legally representing his estate. (W-Art. 27)

Article 28

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

2. Questions of procedure shall be governed by the law of the court to which the case is submitted. (W-Art. 28)

Article 29

1. The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

2. The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted. (W-Art. 29)

Article 30

1. In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

2. In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

3. As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee. (W-Art. 30)

Article 30A

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person. (M4-Art. XI)

CHAPTER IV. PROVISIONS RELATING TO COMBINED TRANSPORTATION

Article 31

1. In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of Article 1.

2. Nothing in this convention shall prevent the parties in the case of combined transportation from inserting in the document of air transportation conditions relating to other modes of transportation, provided that the provisions of this convention are observed as regards the transportation by air. (W-Art. 31)

CHAPTER V. GENERAL AND FINAL PROVISIONS

Article 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by

which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of Article 28. (W-Art. 32)

Article 33

Except as provided in paragraph 3 of Article 5, nothing in this Convention shall prevent the carrier either from refusing to enter into any contract of carriage or from making regulations which do not conflict with the provisions of this Convention. (M4-Art. XII)

Article 34

The provisions of Articles 3 to 8 inclusive relating to documents of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business. (M4-Art. XIII)

Article 35

The expression "days" when used in this convention means current days, not working days. (W-Art. 35)

Articles 36-40[2]

Article 40A

1. In Article 37, paragraph 2 and Article 40, paragraph 1, the expression High Contracting Party shall mean State. In all other cases, the expression High Contracting Party

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[2] Articles 36 to 40 govern participation in and withdrawal from the Convention. Montreal Protocol No. 4 would largely supersede these clauses for the United States and they are therefore omitted here.

shall mean a State whose ratification of or adherence to the Convention has become effective and whose denunciation thereof has not become effective.

2. For the purposes of the Convention the word territory means not only the metropolitan territory of a State but also all other territories for the foreign relations of which that State is responsible. (H-Art. XVII)

Article 41

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this Convention to call for the assembling of a new international conference to consider any improvements which may be made in this Convention. To this end it will communicate with any Government of the French Republic which will take the necessary measures to make preparations for such conference. (W-Art. 41)

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BRIEF FOR THE UNITED STATESAS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether an airline's unreasonable refusal to assist a passenger who becomes ill during an international flight, in violation of industry standards and the airline's own policies, constitutes an "accident" within the meaning of Article 17 of the Warsaw Convention.

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INTEREST OF THE UNITED STATES

As a party to the Warsaw Convention, the United States has a substantial interest in the manner in which the Convention is interpreted by the courts of this Country. The United States also has a substantial interest in the achievement of a sensible balance between protecting U.S. citizens who travel by air outside this Country, including assuring compensation for those who are killed or injured in doing so, and protecting U.S. air carriers from undue and excessive liability. The United States has participated as amicus curiae in other cases in this Court concerning the Warsaw Convention, including *El Al Israel Airlines, Ltd.* v. *Tseng*, 525 U.S. 155 (1999); *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989); and *Air France* v. *Saks*, 470 U.S. 392 (1985).

STATEMENT

1. a. The Convention for the Unification of Certain Rules Relating to International Transportation by Air (Oct. 12, 1929), 49 Stat. 3000, popularly known as the Warsaw Convention, prescribes a comprehensive set of legal principles to govern "all international transportation of persons, baggage or goods performed by aircraft" with respect to carriers' liability to passengers, shippers, and consignees. Art. 1(1).[1] See generally Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967). The Convention was designed to "foster uniformity in the law of international air travel," *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 230 (1996), and "to accommodate or balance the interests of passengers seeking recovery for personal injuries, and the interests of air carriers seeking to limit potential liability," *El Al Israel Airlines, Ltd.* v. *Tseng*, 525 U.S. 155, 170 (1999).

To protect passengers' interests, for example, Article 17 allows a passenger to make out a prima facie case of liability for personal injuries without having to prove that the airline was at fault, as long as the passenger can prove that his injury was caused by an "accident." Article 20 allows the airline to avoid liability by proving that it took "all necessary measures to avoid the damage or that it was impossible for [the airline] to take such measures." The combined effect of Article 17 and Article 20 is to shift the burden of proof with respect to fault from the passenger to the airline. See Lowenfeld & Mendelsohn, *supra*, 80 Harv. L. Rev. at 499-500.

To protect the airline industry's interests, Article 22(1) limits the amount that can be recovered under Article 17 in the event of a death or bodily injury. That limit was set at

[1] All references to Articles of the Warsaw Convention refer to the reproduction of the Convention that follows the note at 49 U.S.C. 40105.

125,000 French francs, equivalent in 1929 to approximately $8300, a "low amount even by 1929 standards." *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 546 (1991); see Lowenfeld & Mendelsohn, *supra*, 80 Harv. L. Rev. at 499 & n.10. Under Article 25(1), however, that limit ceases to apply if the damage is caused by the "willful misconduct" of the airline or its agent, acting within the scope of his employment.[2] In addition, Article 21 enables an airline to avoid or reduce its liability "[i]f the carrier proves that the damage was caused by or contributed to by the negligence of the injured person."

To prevent airlines from circumventing Article 17 by requiring passengers, as a condition of receiving transportation, to waive their right to bring suit for personal injury, Article 23 nullifies "[a]ny provision tending to relieve the carrier of liability."[3] Article 24, in turn, prevents passengers from seeking to circumvent the limitations in the Warsaw Convention (and in particular its limitation on damages) by bringing suit under domestic law outside the terms of the Convention. Article 24 thus gives preemptive effect to Article 17 as well as Article 18, which concerns loss of or

[2] Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (1975) contains language that amends Article 25's protection of passengers by replacing the words "willful misconduct" with the words "done with intent to cause damage or recklessly and with knowledge that damage would probably result," as long as the airline's employee or agent was acting "within the scope of his employment." S. Exec. Rep. No. 105-20 at 29 (1998). The United States Senate gave its advice and consent to ratification of the Protocol in 1998, and it entered into force for the United States on March 4, 1999. See *Tseng*, 525 U.S. at 174 n.14. Because the facts giving rise to this case took place in 1997, Montreal Protocol No. 4 does not apply here.

[3] When the Warsaw Convention was drafted, airlines in some countries made their services contingent upon a passenger's contractual waiver of the right to bring suit for personal injury, and such waivers were often enforceable in court. See *Tseng*, 525 U.S. at 170.

damage to baggage and cargo, and Article 19, which concerns delay. See *Tseng*, 525 U.S. at 168-169.

Over the years, airlines have entered into various agreements, with the support and approval of the United States Government, to waive significant aspects of the liability limitations imposed by the Warsaw Convention. See *Floyd*, 499 U.S. at 549.[4]

b. On July 31, 2003, the United States Senate gave its advice and consent to ratification of the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on May 28, 1999. 149 Cong. Rec. S10,870 (daily ed. July 31, 2003). That new Convention modernizes, and is intended ultimately to replace, the Warsaw Convention and its related protocols. Among the significant provisions in the new Convention are the removal of all caps on liability for passengers' death or bodily injury, the creation of strict liability for recoveries up to 100,000 Special Drawing Rights (approximately $139,000) with liability subject to certain defenses above that amount (Art. 21), and the establishment of an additional basis for jurisdiction in the courts of the principal and permanent residence of the passenger under certain conditions (Art. 33).[5] In many

[4] In the most recent such agreement, concluded in 1996, several dozen major airlines agreed to waive any limit on compensatory liability for claims arising under, and satisfying the liability conditions of, Article 17. Those airlines further agreed to waive the defense of non-negligence under Article 20 (and thereby effectively agreed to strict liability) for such claims in an amount up to 100,000 Special Drawing Rights, which, at the current exchange rate, equals approximately $139,000. See International Air Transport Association: Agreement Relating to Liability Limitations of the Warsaw Convention, Order 97-1-2 (Dep't Transp. Jan. 8, 1997), available in 1997 WL 4834.

[5] The Warsaw Convention provides that an action may be brought "before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination." Art. 28(1).

respects, the new Convention closely follows the language of the Warsaw Convention, as amended by subsequent protocols. The text of Article 17(1), which concerns liability for death or bodily injury, is not significantly different from the text of Article 17 of the Warsaw Convention, and was not intended to constitute a change in substance with respect to the meaning of the term "accident."[6]

The new Montreal Convention will enter into force 60 days after 30 countries deposit instruments of ratification, acceptance, approval, or accession. Art. 53(6). The United States has not yet deposited its instrument of ratification, although 29 other countries have done so. The deposit of the United States' instrument of ratification will result in the Convention's entering into force for the United States 60 days thereafter. The new Convention will apply to all round-trip international travel beginning and ending in the United States or beginning and ending in the territory of another party, as well as to one-way travel between the parties to that Convention.

[6] Article 17(1) of the 1999 Montreal Convention reads:

> The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

The Article-by-Article Analysis of the Convention in the President's submission of the 1999 Montreal Convention to the Senate stated with respect to Article 17(1):

> Paragraph 1 provides for carrier liability for death or bodily injury of a passenger caused by an accident on board the aircraft or in the course of embarking or disembarking. The carrier's limited defenses to liability are provided for elsewhere in the Convention (i.e., Article 21, below). It is expected that this provision will be construed consistently with the precedent developed under the Warsaw Convention and its related instruments.

S. Treaty Doc. No. 106-45, 106th Cong., 2d Sess., at 9 (2000).

2. In late 1997, Dr. Abid Hanson, a 52-year old physician, and his wife, Rubina Husain, traveled with their children and another family from San Francisco to Athens and Cairo for a vacation. Dr. Hanson, who suffered from asthma and was sensitive to tobacco smoke, was not aware before embarking on the trip that the airline, petitioner Olympic Airways, permitted passengers to smoke cigarettes on international flights. At the airport, therefore, Dr. Hanson requested seats for himself and his family in the non-smoking section of the aircraft. The family was seated away from the smoking section on their flights from New York to Athens and from Athens to Cairo, and Dr. Hanson experienced no problems breathing on either flight. Pet. App. 36a.

Dr. Hanson and his family arrived early at the Cairo airport for their return flights to ensure that they would be seated in the non-smoking section. After receiving the family's seat assignments, Ms. Husain showed the check-in agent a letter signed by Dr. Hanson's brother, also a physician, explaining that Dr. Hanson had a history of asthma, and asked the agent to see that the family was seated in the non-smoking section of the plane. Pet. App. 36a-37a.

Dr. Hanson began experiencing breathing difficulties during a layover in the Athens airport, where he was directed to wait in a room where many people were smoking. When the family boarded their flight from Athens to San Francisco, they discovered that they had been assigned seats toward the rear of the airplane cabin, three rows in front of the economy-class smoking section. Pet. App. 37a.

When the family reached their seats, Ms. Husain advised an Olympic Airways flight attendant, Maria Leptourgou, that Dr. Hanson could not sit in a smoking area, and said, "You have to move him." Pet. App. 38a. The flight attendant paid little attention to Ms. Husain's request and told her to "have a seat." *Ibid.* After the plane was fully boarded but before takeoff, Ms. Husain again asked Ms. Leptourgou

to move Dr. Hanson, explaining that he was "allergic to smoke." *Ibid.* Although Ms. Husain was "adamant" about her request, Ms. Leptourgou replied that she could not assign Dr. Hanson to a different seat because the plane was "totally full" and she was too busy at the moment to assist them. *Ibid.*

Shortly after takeoff, the captain turned off the "no smoking" signs. At that point, passengers in the smoking section began smoking, and passengers from other rows stood in the aisles behind Dr. Hanson, smoking and socializing. As a result, Dr. Hanson was surrounded by ambient smoke. When the smoke began to bother Dr. Hanson, Ms. Husain spoke with Ms. Leptourgou a third time, stating, "You have to move my husband from here." Pet. App. 39a. Ms. Leptourgou curtly refused, again stating that the plane was full. *Ibid.* Ms. Leptourgou told Ms. Husain that Dr. Hanson could switch seats with another passenger, but that Ms. Husain herself would have to ask other passengers to do so, without the aid of the flight crew. Ms. Husain, becoming more desperate and adamant, told Ms. Leptourgou that Dr. Hanson "*had* to move," even if the only available seat was in the cockpit or in first-class, but Ms. Leptourgou refused to provide any assistance. *Id.* at 40a.

Unknown to Dr. Hanson and his party, there were 11 empty passenger seats on the aircraft, some of which were in the non-smoking economy class. Pet. Br. 5-6. In addition, there were 28 "non-revenue" passengers on the flight, 15 of whom were seated in economy class rows 15 through 36, much farther from the smoking section, which began in row 51, than were Dr. Hanson and his family, who were seated in row 48. Pet. App. 37a, 40a.

Smoking increased after the meal service. Dr. Hanson asked Ms. Husain for a new inhaler, since his had become empty and the smoke was bothering him, and moved toward the front of the plane to breathe fresher air. He then

gestured to Ms. Husain to get the epinephrine that he carried in an emergency kit that Ms. Husain had stored in a carry-on bag. Ms. Husain administered a shot of epinephrine to Dr. Hanson and ran to the rear of the cabin to awaken Dr. Umesh Sabharwal, an allergy specialist, with whom Dr. Hanson and his family had been traveling. Pet. App. 41a.

Dr. Sabharwal observed that Dr. Hanson was in respiratory distress. Dr. Sabharwal gave Dr. Hanson another shot of epinephrine and began to administer CPR. Dr. Sabharwal and Ms. Husain also administered oxygen to Dr. Hanson, but Dr. Sabharwal eventually concluded that oxygen was not useful because Dr. Hanson could not breathe spontaneously. Other passengers also attempted to help Dr. Hanson, but he died shortly thereafter. Pet. App. 42a-43a.

3. Ms. Husain, on behalf of herself and Dr. Hanson's estate, and the couple's children, all of whom are respondents here, filed this wrongful death suit in California state court under Article 17 of the Warsaw Convention. The case was removed to federal court, which, after a bench trial, held petitioner liable for Dr. Hanson's death.[7]

The district court held that the repeated refusal of petitioner's flight attendant to assign Dr. Hanson to another seat was an "accident" within the meaning of Article 17 of the Warsaw Convention. Pet. App. 51a-52a. The court applied the definition of that term articulated in *Air France* v. *Saks*, 470 U.S. 392, 405 (1985): "an unexpected or unusual event or happening that is external to the passenger." The court reasoned that the flight attendant's conduct was external to Dr. Hanson and, because it was in "blatant disregard of industry standards and airline policies," was not expected or usual. Pet. App. 51a-52a, 58a. The court noted that "the recognized standard of care for flight attendants during

[7] The flight attendant, Ms. Leptourgou, did not testify at trial. Pet. App. 38a.

international air travel demands that a flight attendant make efforts to accommodate a passenger who indicates that he or she needs to be moved for medical reasons." *Id.* at 52a. The court further noted that petitioner's own policies likewise require flight attendants to attempt to move passengers who become ill during flights, if doing so could alleviate their condition. *Ibid.*

In addition, the district court held that the flight attendant's refusal to reseat Dr. Hanson caused his death, Pet. App. 59a-60a; that the flight attendant engaged in "willful misconduct," *id.* at 65a-71a, thereby removing the limits on compensatory damages under the Warsaw Convention; that Dr. Hanson was contributorily negligent in not attempting to switch seats independently, *id.* at 74a-75a; and that his negligence contributed to his death at a rate of 50%, *id.* at 78a. The court consequently reduced respondents' recovery by half. *Id.* at 79a-80a.

The district court awarded respondents $700,000 in pecuniary damages and another $700,000 in non-pecuniary damages. Pet. App. 31a, 80a

4. The Ninth Circuit affirmed. Pet. App. 1a-21a.

The court of appeals, reviewing the district court's "accident" determination under the "clearly erroneous" standard because it was "inextricably intertwined with the facts," held that "the district court's findings and conclusions are well-grounded in the record." Pet. App. 15a, 21a. Applying the *Saks* definition, the court agreed that the flight attendant's refusal to reseat Dr. Hanson "was clearly external to Dr. Hanson, and it was unexpected and unusual in light of industry standards, Olympic policy, and the simple nature of Dr. Hanson's requested accommodation." *Id.* at 14a. The court of appeals further concluded that an airline's failure to act, as well as its affirmative acts, may constitute an "accident": "The failure to act in the face of a known, serious risk satisfies the meaning of 'accident' within Article 17," the

court explained, "so long as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane." *Ibid.*

The court of appeals also affirmed the district court's determinations that the "accident" caused Dr. Hanson's death, Pet. App. 15a-17a, and that the flight attendant's actions and inactions amounted to "willful misconduct," *id.* at 20a-21a.

SUMMARY OF ARGUMENT

The Warsaw Convention imposes liability on an airline for a passenger's death or bodily injury caused by an "accident" that occurred in connection with an international flight. In *Air France* v. *Saks*, 470 U.S. 392 (1985), this Court explained that the term "accident" in the Convention refers to "an unexpected or unusual event or happening that is external to the passenger," and not to "the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." *Id.* at 405-406. Accordingly, the court concluded that a passenger's hearing loss "caused by normal operation of the aircraft's pressurization system," *id*, at 395, was not an "accident" under the Convention, *id.* at 407.

When a passenger becomes ill during an international flight, the airline's response to the illness may amount to "an unexpected or unusual event," and thus satisfy the definition of "accident," applied with the "flexib[ility]" that *Saks* requires. 470 U.S. at 405. The inquiry turns on whether or not airline personnel's response to the medical crisis is objectively reasonable in the circumstances, as measured against industry standards, individual airline policies and practices, and general standards of care. If airline personnel's conduct is unreasonable under that analysis, the passenger's resulting death or bodily injury is not, as in *Saks*, a "reaction to the usual, normal, and expected operation of the aircraft," *id.* at 405-406, but instead is the result of something aberrational

in the aircraft's operation. Both action and inaction by airline personnel in the face of a medical crisis may constitute an "accident": an airline employee's refusal to assist an ill passenger, as occurred here, is not meaningfully distinguishable from an affirmative act.

The understanding that an "accident" may consist of an airline's "unexpected or unusual" response to a medical crisis is fully consistent with the Convention's text and structure, and it advances the Convention's purpose of balancing the interests of air passengers and air carriers. See *El Al Israel Airlines, Ltd.* v. *Tseng*, 525 U.S. 155, 170 (1999). Common carriers have traditionally been understood to have a duty to come to the aid of passengers who suffer illness or injury while in transit. A passenger thus has every reason to expect that airline personnel will respond reasonably to a medical crisis that occurs during flight. If they do not, and thereby aggravate a passenger's condition, the airline may fairly be held accountable for that "accident."

Here, the district court properly analyzed whether the flight attendant's repeated refusal to reseat an asthmatic passenger amounted to an "accident" under the Convention. The district court considered whether the flight attendant's conduct was "unexpected or unusual" in view of the industry standard of care, petitioner's own policies, and what would reasonably have been expected from airline personnel in the circumstances. See Pet. App. 53a-55a. Having concluded that the flight attendant acted in "blatant disregard of industry standards and airline policies," *id.* at 58a, the district court correctly concluded that her conduct was an "accident" that could give rise to liability under the Convention.

ARGUMENT

AN AIRLINE'S UNREASONABLE REFUSAL TO COME TO THE AID OF AN ILL PASSENGER IS AN "ACCIDENT" THAT CAN GIVE RISE TO LIABILITY UNDER THE WARSAW CONVENTION

If airline personnel refuse to render reasonable assistance to a passenger who becomes ill on an international flight, an "accident" has occurred within the meaning of Article 17 of the Warsaw Convention. Any resulting bodily injury or death of the passenger is actionable under the Convention. That conclusion satisfies the definition of an Article 17 "accident" that this Court articulated in *Air France* v. *Saks*, 470 U.S. 392 (1985), is consistent with the text and structure of the Convention, and serves the Convention's purpose of balancing the interests of passengers and air carriers. That conclusion also accords with the United States' interpretation of the Convention, to which "[r]espect is ordinarily due." *El Al Israel Airlines, Ltd.* v. *Tseng*, 525 U.S. 155, 168 (1999); *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982). Accordingly, the courts below correctly held that the refusal of petitioner's flight attendant to respond to repeated requests to reseat an asthmatic passenger away from the smoking section of the aircraft was an "accident" under Article 17.

A. An Airline Employee's Response To A Medical Crisis Can Constitute An "Accident" Within The Meaning Of Article 17 Of The Warsaw Convention

1. Article 17 of the Warsaw Convention, the article that establishes an airline's prima facie liability for a passenger's death or bodily injury, provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if *the accident* which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Art. 17 (emphasis added). The governing French text of Article 17 similarly refers to damage caused by "l'accident." 49 Stat. 3005. Recovery is available under the Convention, therefore, only if a passenger's death or bodily injury results from an "accident" that occurred in connection with the flight.

In *Saks*, this Court held that a passenger's "loss of hearing proximately caused by normal operation of the aircraft's pressurization system" was not an "accident" within the meaning of Article 17. 470 U.S. at 395, 407. The Court noted that the Warsaw Convention nowhere defines the term "accident," the context in which the term is used is not "illuminating," and "the records of [the Convention's] negotiation offer no precise definition of 'accident.'" *Id.* at 399, 403. The Court nonetheless was able to discern the term's meaning from the text, structure, and history of the Convention and from the parties' subsequent conduct. See *id.* at 398-405.

The Court concluded that an "accident" of the sort that can give rise to liability under the Warsaw Convention is "an unexpected or unusual event or happening that is external to the passenger." 470 U.S. at 405. In contrast, the Court observed that, "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply." *Id.* at 406. The Court made clear that the definition of "accident" in Article 17 "should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." *Id.* at 405.

Consistent with the definition of "accident" articulated in *Saks*, passengers may seek recovery under the Warsaw Convention for death or bodily injury resulting from airplane crashes, see, *e.g.*, *In re Air Crash at Little Rock, Ark.*, 291 F.3d 503 (8th Cir. 2002); terrorist attacks, see, *e.g.*, *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 37 F.3d 804 (2d Cir. 1994), cert. denied, 513 U.S. 1126 (1995); and other flight-related occurrences, see, *e.g.*, *Magan* v. *Lufthansa German Airlines*, No. 02-7172, 2003 WL 21912258 (2d Cir. Aug. 12, 2003) (turbulence); *Gezzi* v. *British Airways PLC*, 991 F.2d 603, 604-605 (9th Cir. 1993) (water on stairway to aircraft); *Diaz Lugo* v. *American Airlines, Inc.*, 686 F. Supp. 373, 375 (D.P.R. 1988) (spill of hot liquid). Such events are "unexpected or unusual" in the operation of an aircraft and are "external to the passenger." *Saks*, 470 U.S. at 405.

Under that definition, however, passengers cannot recover for death or bodily injury resulting from heart attacks, strokes, or similar medical events that occur on an aircraft but are unrelated to its operation. See, *e.g.*, *Rajcooar* v. *Air India Ltd.*, 89 F. Supp. 2d 324, 328 (E.D.N.Y. 2000); *Northern Trust Co.* v. *American Airlines, Inc.*, 491 N.E.2d 417, 422 (Ill. App. Ct. 1986). Nor may passengers recover for death or bodily injury caused by the routine operation of an aircraft, such as hearing loss resulting from a normal change in pressurization, as in *Saks*, or deep-vein thrombosis resulting from tight seating arrangements, see *e.g.*, *Scherer* v. *Pan Am. World Airways, Inc.*, 387 N.Y.S.2d 580, 581 (N.Y. App. Div. 1976). As a general matter, such injuries are the result of "the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." *Saks*, 470 U.S. at 406.

2. A different situation is presented when, as here, a passenger seeks to recover not for death or bodily injury resulting from his medical condition alone, but for death or bodily injury resulting from an airline's response to his

medical condition. In appropriate circumstances, the airline's response, including a refusal to respond, satisfies the definition of an "accident" under the Warsaw Convention, applied with the "flexib[ility]" that *Saks* requires, 470 U.S. at 405.

Airline personnel's acts, or refusals to act, in a medical crisis necessarily are events "external to the passenger." *Saks*, 470 U.S. at 405. A flight attendant's response to a passenger's illness, like a pilot's response to severe weather or an equipment malfunction, is part of the "operation of the aircraft." *Id.* at 406. And, if that response deviates from what would be "usual, normal, and expected" in the circumstances, *ibid.*, the Warsaw Convention's requirement of an "accident" is satisfied. See, *e.g.*, *Fishman* v. *Delta Air Lines, Inc.*, 132 F.3d 138, 141 (2d Cir. 1998) (when a flight attendant treated a passenger's earache by applying a scalding compress, the passenger could seek recovery under the Warsaw Convention for the resulting burns to her neck and shoulder, because "the scalding by a flight attendant [was] an unexpected, unusual event that was external to [the passenger]"); *Fulop* v. *Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 664-665 (S.D.N.Y. 2001) (when a passenger suffered a heart attack, the flight crew's failure to make an unscheduled landing, in alleged violation of its own policies, may be sufficiently unexpected or unusual to be an accident); see also pp. 26-27, *infra* (citing similar cases).

Whether an airline employee's response to a medical crisis is "unexpected or unusual," and thus an "accident," turns on its objective reasonableness "after assessment of all the circumstances." *Saks*, 470 U.S. at 405; see, *e.g.*, *Fulop*, 175 F. Supp. 2d at 670 ("What is unusual or unexpected should be gauged by what objectively is usual or reasonably to be expected under particular circumstances.").[8] The relevant

[8] A similar approach is applied in insurance law, which generally considers an injury inflicted on an insured by a third person to be "due to

circumstances may include the nature of the assistance required by the passenger; the extent to which the flight crew knew, or should have known, of the passenger's need for assistance; the location, conditions, and remaining duration of the flight when assistance was required (severe and prolonged turbulence, for example, could preclude movement around the aircraft); whether providing the assistance could pose a risk to the other passengers or crew (as might exist, for example, if an unscheduled landing had to be made in a dangerous area); and any recommendations by medical professionals. In many instances, as here, the inquiry may be informed by "industry norms, internal policies and procedures, and general standards of care," *Fulop*, 175 F. Supp. 2d at 665, although the absence of formal standards or policies should not be dispositive.[9]

It still must be established, of course, that the "accident" —that is, the airline's objectively unreasonable action or inaction—caused the passenger's death or bodily injury. That requirement can be satisfied even if the passenger's internal medical condition was the initial link in the chain of events that caused his death or bodily injury. As the Court observed in *Saks*, "[a]ny injury is the product of a chain of causes, and we require only that the passenger be able to prove that some link in the chain was an unusual or

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accident or accidental means where it was neither foreseen, expected, nor anticipated by the insured." Ferdinand S. Tinio, *Accident Insurance: Death or Injury Intentionally Inflicted by Another as Due to Accident to Accidental Means*, 49 A.L.R.3d 673, 678 (1973) (footnotes omitted). In the present context, however, the analysis focuses on what would reasonably have been anticipated in the circumstances, not on what the injured passenger subjectively would have anticipated.

[9] Contrary to the suggestion of amicus Air Transport Association (Br. 14 n.12), therefore, airlines would not be able to avoid liability under the Warsaw Convention simply by declining to adopt standards or policies for addressing medical events that occur during flight.

unexpected event external to the passenger." 470 U.S. at 406. If, therefore, it is established that the passenger's death would not have occurred, or his injury would not have been as severe, but for the flight crew's "unexpected or unusual" response to his medical condition, the death or bodily injury would not have "result[ed] from the passenger's own internal reaction to the *usual, normal, and expected* operation of the aircraft," *ibid.* (emphasis added), but instead from an aberration in the aircraft's operation.

3. The same analysis applies whether the asserted "accident" involves action or inaction on the part of the airline. In the context of international air travel, an airline employee's refusal to assist an ill passenger, as occurred in this case, is not meaningfully distinguishable from an airline employee's affirmative act. Contrary to petitioner's suggestion (Br. 18-21), both are correctly viewed as an "event or happening" within the *Saks* definition of "accident." It would create perverse incentives, moreover, if a flight attendant's coming to the aid of an ill passenger could give rise to liability under the Warsaw Convention, if done negligently or wrongfully, whereas a flight attendant's ignoring increasingly desperate requests to assist the passenger could never do so. See *McDowell* v. *Continental Airlines, Inc.*, 54 F. Supp. 2d 1313, 1320 (S.D. Fla. 1999) (observing that such a distinction would "create[] an incentive to airlines * * * to completely refuse to treat passengers who are in need of medical help").[10]

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[10] See Tory A. Weigand, *Accident, Exclusivity, and Passenger Disturbances Under the Warsaw Convention*, 16 Am. U. Int'l L. Rev. 891, 955 (2001) ("[I]t is certainly consistent with the Warsaw scheme to find, 'after assessment of all the circumstances,' that an 'accident' occurs when a flight crew does not make reasonable efforts to assist stricken passengers. Such action *or inaction*, if contrary to established airline procedures or standards, could be 'unusual and unexpected' in modern air travel.") (emphasis added).

The fallacy of the position that an "accident" under the Warsaw Convention cannot take the form of inaction is demonstrated by a hypothetical situation posited by the court in *McCaskey* v. *Continental Airlines, Inc.*, 159 F. Supp. 2d 562, 574 (S.D. Tex. 2001). Suppose, said the court, that "a passenger inexplicably collapsed and ceased breathing through no initial accident," and "a medical doctor informs the crew that the passenger's life could be saved, but only if the flight landed within one hour." *Ibid.* If, the court continued, "[t]he plane is within thirty minutes of a suitable airport, but the crew blithely elects to continue on a planned cross-country flight," "[t]he notion that this is not an unusual event is staggering." *Ibid.*

More generally, common carriers have traditionally been understood to have a duty to provide reasonable assistance to passengers who become ill or injured, so that a failure to act in those circumstances can give rise to liability. See Restatement (Second) of Torts § 314A(1) (1965) (see p. 23, *infra*). The law imposes liability in other circumstances as well for failure to act when under a duty to do so.[11]

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[11] See, *e.g.*, Restatement (Second) of Torts § 314B (duty to provide aid to injured employee); 15 U.S.C. 1601 *et seq.* (consumer credit disclosure); 42 U.S.C. 1395dd (duty of hospital to treat emergency patients); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 568-570 (1996) (describing the "patchwork of rules" existing under state statutory and case law relating to "disclosure obligations of automobile manufacturers, distributors, and dealers"); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 115-118 (1989) (obligation to disclose information relating to employee benefit plans); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 150-154 (1972) (obligation to disclose material information under securities laws). See also Edward A. Tomlinson, *The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement*, 20 N.Y.L. Sch. J. Int'l & Comp. L. 451, 452 & n. 2 (2000) (observing that "[m]ost civil law countries * * * recognize a general duty to rescue in their criminal codes" and identifying those countries); A.D. Woozley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 Va. L. Rev. 1273, 1273-1274 (1983) ("In civil-law countries a statutory requirement to render aid, subject to various conditions, is quite common.").

4. The text and structure of the Warsaw Convention are fully consistent with the conclusion that an "accident" includes an airline's unreasonable response to a medical situation that arises during flight. Petitioner's arguments to the contrary are without merit.

As the Court recognized in *Saks*, the Warsaw Convention does not define an "accident" for purposes of Article 17. 470 U.S. at 399. Nor does the context provide any clear indication of which events causing a passenger's death or injury qualify as an "accident." *Ibid.* It therefore cannot be, as petitioner asserts (Br. 16), that "the express language of Article 17" resolves the question here.

In *Saks*, the Court discerned only two textual "clues to the meaning of 'accident'" in the Warsaw Convention: (i) the distinction between an "accident," the event giving rise to liability for death or bodily injury under Article 17, and an "occurrence," the event giving rise to liability for loss or damage of baggage under Article 18, and (ii) the distinction in Article 17 itself between the "accident" and the "injury." See 470 U.S. at 398-399. Both distinctions are preserved by treating an airline's "unexpected or unusual" response to a medical crisis as an "accident." Such an "accident" is distinct from whatever death or bodily injury it causes. And, *other* causes of death or bodily injury, such as the passenger's own internal response to ordinary aircraft conditions, remain mere "occurrences" outside the coverage of Article 17.

Contrary to petitioner's suggestion (Br. 16, 26-27), Article 20(1) does not speak to the question here. Article 20(1) permits an airline to avoid liability under the Convention by proving that it took "all necessary measures to avoid the damage or that it was impossible" to do so. According to petitioner, the Convention's drafters, "[h]aving provided for

a defense turning on the absence of negligence," would not have "intended that the initial 'accident' inquiry be resolved by reference to negligence." Br. 27 (quoting *Krys* v. *Lufthansa German Airlines*, 119 F.3d 1515, 1522 (11th Cir. 1997), cert. denied, 522 U.S. 1111 (1998)). As the Court recognized in *Saks*, however, although Article 17 "involves an inquiry into the nature of the event which *caused* the injury," while Article 20(1) involves an inquiry into "the care taken by the airline to avert the injury," "these inquiries may on occasion be similar." 470 U.S. at 407. Although the Article 17 inquiry is quite similar to the Article 20(1) inquiry in a case such as this one, those inquiries diverge in most cases, in which the "accident" consists of something other than the "unexpected or unusual" conduct of the airline's own personnel.[12]

5. Two foreign courts, which follow the *Saks* definition of an "accident" under the Warsaw Convention, have suggested that the definition is satisfied in circumstances such as those here.

In a recent decision of the Court of Appeals of England and Wales, Lord Phillips held that an "accident" could not arise from airlines' failure to minimize, or warn of, the risks of deep-vein thrombosis. *Re Deep Vein Thrombosis & Air*

[12] Nor does Article 25, which eliminates the monetary limit on liability in cases of "willful misconduct," suggest that the existence of an "accident" cannot be determined by reference to the reasonableness of airline personnel's conduct. Although the "accident" inquiry and the "willful misconduct" inquiry may overlap in some Warsaw Convention cases, "willful misconduct" requires a greater degree of culpability than does unreasonableness and, according to some courts, a showing of the actor's subjective state of mind. See, *e.g.*, *Bayer Corp.* v. *British Airways, PLC*, 210 F.3d 236, 238-240 (4th Cir. 2000). Thus, as the district court recognized here, the flight attendant's refusal to reseat Dr. Hanson could be an "accident" without being "willful misconduct." Compare Pet. App. 50a-60a with *id.* at 65a-71a.

Travel Group Litig., [2003] EWCA Civ 1005 (July 3, 2003) (Transcript: Smith Bernal). Lord Phillips reasoned that an "omission to act" of that sort cannot constitute an accident. Lord Phillips nonetheless viewed the flight attendant's refusal to reseat Dr. Hanson in this case—as well as the airline's refusal to make an emergency landing after a passenger suffered a heart attack in *Fulop*, 175 F. Supp. 2d at 673—as involving conduct that can constitute an accident under the Convention. With respect to this case, Lord Phillips observed that "[t]he refusal of the flight attendant to move Dr. Hanson cannot properly be considered as mere inertia, or a non-event," but instead "was a refusal to provide an alternative seat which formed part of a more complex incident, whereby Dr. Hanson was exposed to smoke in circumstances that can properly be described as unusual and unexpected."

The Supreme Court of Victoria, in an Australian case under the Warsaw Convention also involving deep-vein thrombosis, described the present case as "illustrat[ing] the point that an accident, as *Saks* uses the word, may include action or inaction by airline staff" or the airline itself. *Povey* v. *Civil Aviation Safety Auth.*, 7223 of 2001, No. BC 200207836 (Dec. 20, 2002). The court added that, "[w]here, objectively viewed, an airline would be expected to act in a particular way (or refrain from doing so) having regard to what is usual or expected in air travel at the time of injury, its failure to so act could constitute an accident."[13]

[13] Although the court in *Povey* declined to dismiss the case before trial, suggesting that a failure to warn of deep-vein thrombosis might be an "accident" under the Warsaw Convention, other Australian courts have held to the contrary without addressing the present case. See, *e.g.*, *Rynne* v. *Lauda-Air Luftfahrt Aktiengelsellschaft*, [2003] QDC 004 (Dist. Ct. Queensland Feb. 7, 2003).

B. Subjecting Airlines To Liability Under The Warsaw Convention For Injuries Caused By Their Unreasonable Response To A Medical Crisis Properly Balances The Interests Of Passengers And Airlines

Allowing passengers to seek recovery for death or bodily injury caused by an airline's "unexpected or unusual" response to a medical crisis accords with the Warsaw Convention's purpose "to accommodate or balance the interests of passengers seeking recovery for personal injuries, and the interests of air carriers seeking to limit potential liability." *Tseng*, 525 U.S. at 170. The interests served by imposing liability on airlines in such circumstances are substantial; the interests served by precluding recovery are not.

The Court has recognized that a flexible application of the "accident" definition ameliorates the harshness to passengers of the Warsaw Convention's exclusivity in affording a remedy for their injuries and prevents airlines from "escap[ing] liability" for their own wrongful conduct. *Tseng*, 525 U.S. at 172; see U.S. Br. 18-19 n.11, *Tseng* (No. 97-475) (observing that "[t]he expansive scope of the term 'accident' is one answer to the * * * concern that carriers not escape liability for their intentional torts") (citation omitted). As *Tseng* implies, such flexibility is especially warranted when, as here, the consequence would be to subject an airline to liability under the Warsaw Convention for injuries caused by its *own* misconduct and that of its agents, not by unrelated third parties or natural forces. Indeed, if the "accident" definition is "flexibl[e]" enough to "encompass torts committed by terrorists or fellow passengers," as the Court noted with seeming approval in *Saks*, the definition surely is flexible enough to encompass the "unexpected or unusual" conduct of an airline's own employees. 470 U.S. at 405; cf. *Tseng*, 525 U.S. at 165 n.9.

A passenger has every reason to expect that an airline will respond reasonably to a medical crisis that arises during

a flight. As noted above, the law has traditionally viewed common carriers, such as airlines, as standing in a "special relation" to their passengers, which imposes a duty "to protect [passengers] against unreasonable risk of physical harm" and "to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others." Restatement (Second) of Torts § 314A(1); see *id.* cmt. d ("The duty to give aid to one who is ill or injured extends to cases where the illness or injury is due to natural causes, to pure accident, to the acts of third persons, or to the negligence of the plaintiff himself, as where a passenger has injured himself by clumsily bumping his head against a door."); *McDowell*, 54 F. Supp. 2d at 1319 ("It is recognized in most jurisdictions that airlines owe a heightened duty of care to their passengers."); cf. 49 U.S.C. 44701(d)(1)(A) (noting "the duty of an air carrier to provide service with the highest possible degree of safety in the public interest").[14]

Airline passengers, even more so than passengers of other common carriers, are uniquely dependent on the carrier for their health, safety, and comfort while on board. By necessity, when passengers step onto an airplane, they place their well-being in the hands of the airline. Passengers must depend on airline personnel not only to pilot the aircraft to

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[14] The common law duty of carriers to protect passengers who are ill or incapacitated, including those incapacitated as a result of their voluntary intoxication, was well established at the time that the Warsaw Convention was drafted. See, *e.g.*, *Fardette* v. *New York & S. Ry.*, 180 N.Y.S. 179 (N.Y. App. Div. 1920) (question of fact existed on whether railroad was negligent in requiring intoxicated passenger to stand on outdoor platform of car rather than taking a seat inside); *Benson* v. *Tacoma Ry. & Power Co.*, 98 P. 605 (Wash. 1908) (jury could find that railroad was negligent in allowing intoxicated passenger to stand on platform); *Williams* v. *Louisville & N.R. Co.*, 43 So. 576 (Ala. 1907) (railroad could be held liable for negligence of its employees in assisting ill passenger in boarding train).

its destination, but also to maintain the air pressure and temperature of the cabin, to control the behavior of other passengers, and even to supply the very air that they breathe. A passenger, moreover, must remain within the narrow confines of the cabin—perhaps in his own seat—for hours at a time between scheduled landings. (An unscheduled landing, even when feasible, cannot be immediate.) It is thus essential, and reasonably to be expected, that flight attendants and other airline personnel will respond appropriately to medical situations that arise during flight. If they instead respond in an "unexpected or unusual" manner (which may include not responding at all), and thereby cause a passenger's death or bodily injury, the airline may fairly be held accountable for that "accident" under the Warsaw Convention.[15]

The airline industry is unlikely to be burdened significantly by recognizing such incidents to be "accidents." Cases similar to this one, fortunately, are relatively few. It remains available to the airline, moreover, to establish that its conduct was not "unexpected or unusual" in the particular

[15] A passenger who becomes ill during a flight has particular reason to expect a flight attendant to come to his assistance. The flight attendant's role has traditionally been associated with the protection of passengers' safety and health aboard the aircraft. In fact, when flight attendants were introduced into commercial aviation in the early 1930s (and thus during the period immediately following the entry into force of the Warsaw Convention), many airlines required their flight attendants to be nurses, a practice that continued until the demand for nurses increased during World War II. See, *e.g.*, Johanna Omelia & Michael Waldock, *Come Fly With Us! A Global History of the Airline Hostess* 12-13, 18, 32 (2003); *id.* at 25 (quoting airline's promotional pamphlet referring to its "stewardess-nurses"); Georgia Panter Nielsen, *From Sky Girl to Flight Attendant: Women and the Making of a Union* 10 (noting that original flight attendants wore their nurse uniforms during flights), 24 (1982); United Air Lines, *Flight attendant history: 1926-1933* (visited Aug. 27, 2003) <http://www.ual.com/page/article/0,1360,3211,00.html>.

circumstances or was not a cause of the passenger's injury. Other defenses, such as comparative fault, that may reduce or eliminate the airline's liability may be available as well. And even when an airline is found liable, the payment of compensation would typically be limited to a single passenger's death or bodily injury, in contrast to cases involving crashes and similar events involving the death or bodily injury of many passengers.

Contrary to the suggestion of amicus Air Transport Association (Br. 15), the Warsaw Convention's other purpose, "achiev[ing] uniformity of rules governing claims from international air transportation," *Tseng*, 525 U.S. at 169, is not undermined by the understanding of "accident" urged here. The Court determined in *Saks* that the term "accident," in European as well as American jurisprudence, refers to events that are "fortuitous, unexpected, unusual, or unintended." 470 U.S. at 400. An airline's "unexpected" or "unusual" response to a medical crisis during flight fits comfortably within that definition. Indeed, as noted above (at pp. 20-21), courts in two other countries have indicated that conduct of the sort at issue here can constitute an "accident" under the Convention.

C. The Lower Courts Correctly Held That The Refusal Of Petitioner's Flight Attendant To Render Assistance To Dr. Hanson When Informed Of His Medical Condition Was An "Accident" Under The Warsaw Convention

1. The district court's decision in this case, affirmed by the court of appeals, reflects the correct approach to determining the existence of an "accident" under the Warsaw Convention.

The district court focused on whether the flight attendant's conduct—not Dr. Hanson's asthma and sensitivity to the cabin's ambient cigarette smoke, standing alone—"was

an 'unusual' or 'unexpected' event." Pet. App. 50a. The court then analyzed whether the flight attendant's refusals to reseat Dr. Hanson were indeed "unusual" or "unexpected," considering whether, and to what extent, such conduct deviated from "the accepted industry standard of care," petitioner's own policies, and what Dr. Hanson would reasonably have expected from airline personnel. *Id.* at 53a-55a. In particular, the court relied on "extensive testimony on the standard of care for flight attendants in situations such as this," which "demands that a flight attendant make efforts to accommodate a passenger who indicates that he or she needs to be moved for medical reasons," "even if the flight ha[s] no empty seats in the economy section." *Id.* at 52a. The court also relied on evidence that petitioner's own policy was to "make efforts to move passengers who become ill during flights if moving those passengers will assist in their recovery," including "a passenger [who] must be moved because of smoke-related illness." *Id.* at 53a. Based on all of that evidence, the court could properly conclude that the flight attendant's "failure to respond appropriately to Ms. Husain's requests and her failure to comply with the applicable standards of care were both 'unexpected' and 'unusual,'" and consequently were "actionable under the Warsaw Convention." *Id.* at 58a-59a; see *id.* at 14a (affirming that the flight attendant's conduct was "unexpected and unusual in light of industry standards, Olympic policy," and the reasonableness of the request for assistance).

Several courts have similarly recognized that airline personnel's unreasonable response to a medical crisis can constitute an "accident" under the Warsaw Convention. See *e.g.*, *Fishman*, 132 F.3d at 143; *Gupta* v. *Austrian Airlines*, 211 F. Supp. 2d 1078, 1083-1085 (N.D. Ill. 2002); *Fulop*, 175 F. Supp. 2d at 673; *McCaskey*, 159 F. Supp. 2d at 571; *Turturro* v. *Continental Airlines*, 128 F. Supp. 2d 170, 175 n.1

(S.D.N.Y. 2001); *Kemelman* v. *Delta Air Lines, Inc.*, 740 N.Y.S.2d 434, 435 (N.Y. App. Div. 2002).[16]

2. Other courts, following the lead of the Third and Eleventh Circuits, have declined to find an "accident" when a flight crew's allegedly negligent action or inaction aggravated a passenger's medical condition. See *Abramson* v. *Japan Airlines Co.*, 739 F.2d 130, 132-133 (3d Cir. 1984), cert. denied, 470 U.S. 1059 (1985); *Krys*, 119 F.3d at 1520-1522 (citing additional cases).

In *Abramson*, a case that predated *Saks*, flight attendants refused to provide a place where a passenger who suffered a paraesophageal hiatal hernia attack could lie down and administer a "self-help remedy." Relying on cases involving passengers who suffered hearing loss or other medical consequences as a result of normal flight, see 739 F.2d at 132-133, the Third Circuit stated that, "[i]n the absence of proof of abnormal external factors, aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an 'accident' within the meaning of Article 17," *id.* at 133. Without expressly addressing whether, or in what circumstances, a flight attendant's response to a medical crisis could be an "abnormal external factor[]," the court held that "the alleged acts and omissions of [the airline] and its employees during the routine flight on which [the plaintiff] was a passenger do not constitute an 'accident.'" *Ibid.*[17]

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[16] Cf. *Langadinos* v. *American Airlines, Inc.*, 199 F.3d 68, 71 (1st Cir. 2000) (flight attendant's continuing to serve alcohol to passenger whose behavior was already "erratic" and "aggressive" was an "accident"); *Schneider* v. *Swiss Air Transport Co. Ltd.*, 686 F. Supp. 15, 17 (D. Me. 1988) (flight attendant's refusal to assist passenger by asking passengers in front of her to raise their seats could be an "accident").

[17] In *Saks*, the Court cited *Abramson* as one of several cases "refus[ing] to extend the term ['accident'] to cover routine travel procedures that produce an injury due to the peculiar internal condition of a

In *Krys*, after a passenger suffered a heart attack, the flight crew failed to make an unscheduled landing, thereby aggravating the damage to the passenger's heart. The Eleventh Circuit reasoned that the external event that could be said to have caused the passenger's aggravated injury was "the continuation of the flight from its scheduled point of departure to its scheduled point of arrival." 119 F.3d at 1521. The court concluded, therefore, that the aggravated injury "arises not from an 'unexpected or unusual happening,' but rather from the 'passenger's own internal reaction to the usual, normal, and expected operation of the aircraft.'" *Ibid.* (quoting *Saks*, 470 U.S. at 405-406). The court acknowledged, however, that "this is a close question," and noted that "it is at least arguable that where injury is caused by crew negligence, the injury arises from 'an unexpected or unusual event or happening external to the plaintiff.'" *Ibid.* (quoting *Saks*, 470 U.S. at 405).

The courts in *Abramson* and *Krys* did not apply the Warsaw Convention's "accident" definition with the flexibility that *Saks* requires. When those cases were decided, the Third and Eleventh Circuits had held, contrary to this Court's subsequent decision in *Tseng*, that the Convention did not preempt other remedies not subject to the Conven-

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passenger." 470 U.S. at 405. The citation of *Abramson* was accompanied by the parenthetical description "sitting in airline seat during normal flight which aggravated hernia not an 'accident.'" *Ibid.* The proposition for which the Court cited *Abramson* is consistent with the United States' position here: that the "accident" requirement is not satisfied when a passenger suffers an illness or injury during, or in reaction to, "the usual, normal, and expected operation of the aircraft." *Id.* at 406. The "accident" requirement may be satisfied, however, when the flight crew *responds* to the illness or injury in a manner that is not "usual, normal, and expected." The Court did not characterize *Abramson* as taking any position on the latter point; indeed, *Abramson* itself recognized that "abnormal external factors" may constitute an "accident." 739 F.3d at 133.

tion's monetary limits on recovery. *Abramson*, 739 F.2d at 134; *Krys*, 119 F.3d at 1522-1530. For that reason, the airline in *Krys* argued that "a negligent response to a passenger's heart-attack symptoms constitutes an 'accident,'" while the plaintiffs argued that "there was no 'accident' within the terms of the Warsaw Convention." 119 F.3d at 1519. Several courts have questioned whether *Abramson* and *Krys* would have applied the "accident" definition in the same manner had they understood that the Convention was the plaintiffs' exclusive remedy. See *Fulop*, 175 F. Supp. 2d at 666; *McCaskey*, 159 F. Supp. 2d at 573; *McDowell*, 54 F. Supp. 2d at 1319-1320.

In sum, as the lower courts recognized in this case, an airline employee's response to a passenger's illness can constitute an "accident" under the Warsaw Convention, if that response is "unexpected or unusual" as measured against industry standards, airline policies and practices, or other indicia of what would be reasonable in the circumstances.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 02-1348

IN THE

Supreme Court of the United States

OLYMPIC AIRWAYS,

Petitioner,

v.

RUBINA HUSAIN, individually and as personal representative of the estate of Abid M. Hanson, M.D., HANNAH HUSAIN, SARAH HUSAIN, ISAAC HUSAIN, by and through their guardian ad litem RUBINA HUSAIN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE REPLY BRIEF *AMICUS CURIAE* AND BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* IN REPLY TO BRIEF *AMICUS CURIAE* OF THE UNITED STATES

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE REPLY BRIEF AMICUS CURIAE

The Air Transport Association of America, Inc. (the "ATA") respectfully moves to file the attached reply brief *amicus curiae* for the limited purpose of responding to arguments raised for the first time in this case by the United States in its *amicus curiae* brief in support of Respondents. Petitioner Olympic Airways ("Olympic") has given its consent for the ATA to file this brief, and Olympic's counsel has filed its verification of that consent with the Court. The ATA requested the consent of counsel for Respondents, but that consent was denied. With the consent of the parties, the ATA earlier filed a brief *amicus curiae* in support of Olympic urging reversal of the United States Court of Appeals for the Ninth Circuit. The ATA's

deep-seated interest in the case has been stated. *See* Br. of the Air Transport Association of America, Inc. as Amicus Curiae in Support of Pet'r at 2-3.

The ATA recognizes that the Rules of the Supreme Court do not provide for the filing of a reply brief by an *amicus curiae*. The ATA submits that Rule 37.4(a), prohibiting the filing of a reply brief as an *amicus curiae*, should be waived here. The United States' position, as set forth in its *amicus curiae* brief in support of Respondents, effectively rewrites the Warsaw Convention and the Montreal Convention[1] (which is currently in the process of entering into force for many countries, including the United States). The United States' brief raises fundamental problems at a very sensitive time, as countries around the world are considering whether to ratify the Montreal Convention.

Through its *amicus curiae* brief, the United States has asked the Court to rewrite the Warsaw Convention to incorporate national law in the definition of "accident," and turn the treaty into a fault-based liability scheme based upon the heightened standard of care imposed on common carriers in the United States. This is a standard of care that has never before been applied to the Warsaw Convention, and its application undermines the treaty's overriding goal of uniformity. In setting forth its position,

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[1] *See* Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, ICAO Doc. 9740, S. Treaty Doc. No. 106-45 ("Montreal Convention"). On July 31, 2003, the United States Senate approved the Montreal Convention. The United States has deposited with the International Civil Aviation Organization on September 5, 2003 its instrument of ratification. The Montreal Convention will enter into force on "the sixtieth day following the date of deposit of the thirtieth instruction of ratification, acceptance, approval or accession with the Depositary." *Id.*, art. 53(6). The United States was the thirtieth state to consent to be bounded by the convention. The convention will be entered into force November 4, 2003.

the United States fails to mention a recent case from the United States Court of Appeals for the Ninth Circuit which is contrary to its invocation of common-law principles. *See Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 999 (9th Cir. 2002), *cert. denied* 123 S. Ct. 1284 (Feb. 24, 2003) (holding that common-law doctrine of *forum non conveniens* cannot be applied to Warsaw Convention claims because it is contrary to the civil-law principles that form the foundation of the Convention).

The United States has advanced its unprecedented new position without consultation with the air carrier industry, the other signatory countries of the Warsaw Convention, or the countries who have ratified or are in the process of ratifying the Montreal Convention.

Since the ATA filed its original *amicus curiae* brief, this case has taken on a greater significance than the current parties and issues before the Court. Another important Warsaw Convention case is currently pending in the United States Court of Appeals for the Fifth Circuit, *Blansett v. Continental Airlines, Inc.*, Case No. 03-40545.[2] The issue there is whether an airline can be held liable to a passenger under a failure to warn theory of liability. In *Blansett*, the plaintiffs argued that an airline had a duty to warn passengers of the risk of developing deep vein thrombosis (essentially a blood clot) during long international flights. In a decision that is at odds with the weight of the international authority, the United States District Court for the Southern District of Texas held that the Warsaw Convention imposed such a duty on the defendant airline. *See generally Blansett v. Continental Airlines, Inc.*, 237 F. Supp. 2d 747 (S.D. Tex. 2002).

The Fifth Circuit held oral argument in *Blansett* on September 4, 2003. Recently, however, that court entered

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[2] The ATA also is participating as an *amicus curiae* in *Blansett*.

an Order deferring its decision until after this Court rules on the merits of this case. *See* Letter from Clerk of Fifth Circuit to Counsel of Record, *Blansett v. Continental Airlines, Inc.*, Case No. 03-40545 (Sept. 17, 2003), Appendix at 1a.

Both this case and *Blansett* are of significant concern to the airline industry. Under the Warsaw Convention, and its soon-to-be successor, the Montreal Convention, the airline industry has agreed to an unlimited strict liability regime. The District Court in *Blansett* and the Ninth Circuit below both imposed fault-based theories of liability on airlines that are incompatible with that liability regime. In doing so, these courts imposed common-law duties on the airlines that far exceed any duty previously recognized as being owed by an airline to a passenger relating to international air transportation. The ATA seeks to file the attached *amicus curiae* brief to address the concerns of its members and to correct statements of fact and law made by the United States in its *amicus curiae* brief.

The Court has previously allowed an *amicus curiae* to file a reply brief when another *amicus curiae* has raised arguments that are of substantial concern to the industry in question for the first time after the *amicus curiae* filed its original brief. *See, e.g., Alabama v. Shelton*, 535 U.S. 654, 671 (2002) (noting that National Association of Criminal Defense Lawyers filed reply brief as *amicus curiae*); *Ginzburg v. United States*, 383 U.S. 463 (1966) (*amicus curiae* Citizens for Decent Literateur, Inc. filed a reply brief in addition to an *amicus curiae* brief). The ATA submits that this case also is one where the filing of a reply brief by this *amicus curiae*, representing the interest of the U.S. air carrier industry, is appropriate.

The ATA therefore respectfully requests that the Court waive the requirements of Rule 37.4(a), and that the ATA be granted leave to file its *amicus curiae* reply brief in support of Olympic urging reversal of the court below.

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IN THE

Supreme Court of the United States

No. 02-1348

OLYMPIC AIRWAYS,

Petitioners,

v.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* IN REPLY TO BRIEF *AMICUS CURIAE* OF THE UNITED STATES

The Air Transport Association of America, Inc. (the "ATA"), as *amicus curiae*, files this reply brief in support of Petitioners. The brief responds to the arguments made by the United States in its Brief as *Amicus Curiae* Supporting Respondents.[1]

[1] No party to this case had any role in drafting this brief, or provided any monetary support for its preparation or filing. *See* Supreme Court Rule 37.6.

ARGUMENT

In its *amicus curiae* brief, the United States urges this Court to find that the Warsaw Convention[2] imposes on international air carriers the heightened duties and standards that traditionally have been imposed by common-law courts on common carriers in the context of negligence-based tort systems. In making its arguments, the United States urges the Court to engraft domestic common-law standards of common carrier liability on this treaty-based no fault liability system that was designed to achieve uniformity among the great variety of legal systems around the world. The Court should reject the position and interpretation offered by the United States. The Warsaw Convention itself, the Court's precedent interpreting that Convention (most notably *Air France v. Saks*, 470 U.S. 392 (1985)), and the facts of this case do not support the position advanced by the United States. If this Court should embrace that position, the effect would be to rewrite the Warsaw Convention with respect to the substantive provisions controlling air carrier liability. The ATA, therefore, urges the Court to reject the United States' position.

1. The United States seeks to impose the heightened standards of common carrier duty and liability on air carriers engaged in international air transportation. It seeks to achieve this goal by improperly expanding the definition of "accident" under Article 17 of the Warsaw Convention to require the imposition of liability every time an airline would be liable under the traditionally heightened common carrier standards. If embraced by this Court, this position would (1) undermine the uniformity

[2] The Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 29, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in 49 U.S.C. § 40105 (note) (2000) (hereinafter "Warsaw Convention" or "Convention").

and exclusivity of air carrier liability under the Convention that this Court's decision in *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999), requires, and (2) contradict the non-fault-based meaning of "accident," which this Court adopted in *Saks*. In short, it would effectively overturn both *Tseng* and *Saks*, and throw the liability rules of the Warsaw system into chaos at this very critical and sensitive time for this treaty-based system.[3]

In *Tseng*, which held that the Warsaw Convention provides the exclusive remedy for a passenger injured during an international flight, this Court specifically held that the Convention operates exclusive of state law. The Court reasoned that "[r]ecourse to local law . . . would undermine the uniform regulation of international air carrier liability that the Warsaw Convention was designed to foster." *Tseng*, 525 U.S. at 161. The exclusive liability scheme created by the Warsaw Convention is fixed unless and until it is modified by the mutual agreement of the signatory nations. The United States errs in suggesting that the Court impose an extra-treaty legal construct of heightened common carrier liability on the Convention.

[3] As discussed in greater detail in the ATA's motion for leave to file this reply *amicus curiae* brief, the Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, ICAO Doc. 9740, S. Treaty Doc. No. 106-45 ("Montreal Convention") is currently in the process of entering into force for many countries, including the United States. When it enters into force on November 4, 2003, it will replace the Warsaw Convention as the treaty governing the duties and liabilities of those engaged in international air transportation. Many of the substantive provisions of the Warsaw Convention – including the substance of Article 17 – are being carried forward in the Montreal Convention. Accepting the United States' position of heightened air carrier liability and duty – which has never before been discussed in the context of the Warsaw Convention – would put the future of that Convention, as well as its successor, the Montreal Convention, at risk.

In urging the Court to adopt the heightened obligations imposed by the courts of this country upon common carriers, the United States focuses on duty, industry standard of care, and foreseeability, all of which are negligence-based concepts developed by common-law jurisprudence. Common-law theories of liability that have developed in this country and other common law systems cannot be read into this international convention, which was designed to achieve uniformity among the diverse legal systems of the world. *See Tseng*, 525 U.S. at 16-70; *see also Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1522 (11th Cir. 1997) ("[W]e think it unlikely that the drafters intended that the initial 'accident' inquiry be resolved by reference to negligence."). It is particularly problematic to alter the duties and liabilities imposed by the Warsaw system now when the Montreal Convention is at such a critical stage in its adoption process.

The common carrier theory of heightened duty proposed by the United States as falling within the scope of an Article 17 "accident" under the Warsaw Convention is a common law, negligence-based theory of fault. The courts of various states of this country and other common law countries adopted this heightened duty from the common law courts of Great Britain. *See generally* Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1157-1169 (1990) (explaining common-law historical background of heightened standard of care for common carrier liability).

In contrast to common-law liability which might be imposed on companies engaged in domestic transportation, liability for personal injury or death in the course of international air transportation is governed exclusively by Article 17 of the Warsaw Convention. There is no mention in Article 17 or elsewhere in the Warsaw Convention (or in the Montreal Convention) that the heightened standard of

care imposed by common law courts should be applied in any way on international air transportation liability. The Court should reject the United States' suggestion that it read this substantive local law into this treaty-based system.

Article 17 contains no direction to the forum court to apply its local substantive law of carrier liability. In stark contrast, two other provisions of the Convention do instruct the forum court to apply local law – Articles 28 and 29. Both of these articles concern procedural issues: Article 28 addresses the forum in which a Warsaw Convention claim may be brought and the law to be applied in the chosen forum; Article 29 provides a statute of limitations of Warsaw Convention claims. Paragraph 2 of Article 28 provides that "[q]uestions of procedure shall be governed by the law of the court to which the case is submitted." Warsaw Convention, art. 28(2). Similarly, paragraph 2 of Article 29 provides that the "method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted." *Id.* at 29(2). The references to local law for these procedural provisions are carried forward in the Montreal Convention. *See* Montreal Convention, arts. 33(4) & 35(2).

No similar language in Article 17 of either the Warsaw or the Montreal Convention directs the court to apply the local law when determining whether a passenger has met his or her burden of establishing that the threshold accident occurred, as the United States would have this Court do in this case. The Convention's drafters clearly knew how to direct the courts to local law when they deemed the application of local law appropriate. And, those drafters chose not to do so in Article 17 or any other substantive provision of the Convention. It would make little sense for a treaty system that has a principal goal of uniformity regarding liability standards to allow one jurisdiction to impose liability based upon a local (or

national) common law standard of care, and another jurisdictiont to find that no liability based upon a different standard of care.

Nothing in the history of the Warsaw Convention suggests that common-law theories of liability should be employed to implement or interpret its provisions. In a case that the United States failed to acknowledge in its brief, the United States Court of Appeals for the Ninth Circuit recently concluded that the "continental jurists" who drafted the Warsaw Convention meant to recognize only civil (codified) law, as opposed to common law, in the interpretation of the Convention's rules. *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 999 (9th Cir. 2002), *cert. denied* 123 S. Ct. 1284 (Feb. 24, 2003). The Ninth Circuit found it "unreasonable to infer that the 'continental jurists,' would have succumbed to the British, common law point of view." *Id.* (internal citation omitted). Like the procedural common law issue addressed in *Hosaka* (*forum non conveniens*), the common law legal principle urged by the United States here derives from "the British common law point of view." The ATA disagrees with the holding in *Hosaka* as it applies to areas where the Convention specifically and expressly defers to national law, such as Articles 28 and 29,[4] the drafters of the Convention never intended that constantly evolving substantive common law should determine the meaning of the treaty's essential terms.

Regardless of the policy reasons for imposing a heightened duty of care on common carriers in the United States, nothing in the Warsaw Convention (or in the Montreal Convention) suggests that it should apply here.

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[4] Following the Ninth Circuit's decision in *Hosaka*, the defendant airline filed a Petition for a Writ of *Certiorari* from this Court, which the ATA supported as *amicus curiae*. The United States took no position on that Petition, which this Court denied earlier this year. *See Hosaka v. United Airlines, Inc.*, 123 S. Ct. 1284 (Feb. 24, 2003).

Allowing a court to engage in the common-law jurisprudence applied in the United States but not in all signatory States will lead directly to the very result the Convention was intended to avoid – the application throughout the world of numerous and diverse tests of liability based on the substantive law of the forum chosen by the plaintiff. The ATA, as *amicus curiae*, urges the Court to reject the United States' position.

2. To tempt the Court to reach a holding that is tantamount to overturning both *Tseng* and *Saks* and to accept instead its tortured interpretation of the Warsaw Convention's treaty-based system of liability, the United States ignores the traditional warning that bad facts make bad law and even makes them appear worse than they actually are. The United States incorrectly declares that Olympic failed to respond properly to an illness that a passenger developed during the course of the flight and that Olympic failed to properly respond to a "medical crisis." Br. of United States at 18, 26. Based upon this mischaracterization of fact, the United States submits that "[c]ommon carriers have traditionally been understood to have a duty to come to the aid of passengers who suffer illness or injury while in transit." *Id.* at 13.

This is not a case where an airline failed to respond properly to a passenger's medical emergency; rather, it is a case where an airline was held liable *for failing to prevent* a medical emergency from arising. The evidence at trial established that the passenger, Dr. Abid M. Hason, had a history of asthma long before he even made his travel plans or stepped aboard the airplane in Athens. *See Husain v. Olympic Airways*, 316 F.3d 829, 832-33 (9th Cir. 2002), Petitioner"s Appendix[5] at 4a-5a. The courts below held

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[5] Hereafter citations to the Appendix filed by Olympic are cited as "Pet. App. at ___."

Olympic liable for refusing to move his assigned seat further away from the smoking section upon his wife's three request. Each request, which the courts below found to constitute an Article 17 "accident," was made before Dr. Hanson was in any medical emergency.[6]

At the time of each request, there was no "medical crisis" as the United States would have this Court believe, nor did Olympic refuse "to assist an ill passenger" or a "stricken passenger[]." Br. of United States at 18, 20 & n.10. At most, when Dr. Hanson's wife made the third and final request, the smoke was "bothering" him and perhaps making him uncomfortable. When Dr. Hanson and his wife failed to accept Olympic's offer that they ask other passengers to voluntarily switch seats with him, Olympic was certainly justified in believing that the smoke only made him uncomfortable and did not present a medical emergency.

The United States' version of the facts evidences the weakness of its argument. The facts and legal issue presented by this case can be stated simply – is the threshold requirement of "accident" met for Article 17 liability when a passenger's pre-existing medical condition is aggravated by exposure to a normal condition in the

[6] Upon boarding the plane and before there was any cigarette smoke in the passenger cabin to aggravate his pre-existing asthmatic condition, Dr. Hanson's wife asked a flight attendant to reassign him to a non-smoking seat further away from the smoking section. *See id.* The flight attendant refused. Before the airplane took off and again before there was any cigarette smoke on the airplane, Dr. Hanson's wife asked again that he be moved to a different seat, but was refused once again. *See id.* at 834 n.5, Pet. App. at 7a n.5. Shortly after the airplane took off, passengers in the smoking section began to smoke, and the smoke began to "bother[]" Dr. Hanson. *Id.* at 834, Pet. App. at 7a. His wife again asked the same flight attendant to move him, and the attendant again refused, but offered his wife the alternative option of asking other passengers if they would voluntarily switch seats with him. *See id.*

aircraft cabin, *even assuming the air carrier could have attempted some measures to prevent* the aggravation of the passenger's pre-existing medical condition? As developed at length in Olympic's briefs and the original *amicus curiae* brief of the ATA, the answer is clearly "No," but the expansive argument of the United States nonetheless puts the Warsaw liability regime at risk.

3. This Court's precedent is clear that there can be no recovery under the Warsaw Convention when a passenger suffers injury or death from "the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." *Saks*, 470 U.S. at 406. *Saks* further teaches that the "accident" inquiry focuses solely on the "nature of the event which caused the injury rather than the care taken by the airline to avert the injury." *Id.* at 406-07. As discussed in the ATA's original amicus curiae brief, *Saks* has been followed by the courts of this country and other countries.[7] To find liability here would be to overturn *Saks*.

Second-hand cigarette smoke in the passenger cabin of an aircraft is a "usual, normal, and expected" condition for an international air flight that allows smoking.[8] Thus, the facts of this case – failing to prevent aggravation of a pre-existing asthmatic condition by a normal and expected

[7] The *Saks* definition of "accident" under Article 17 is now accepted world-wide. *See, e.g., Morris v. KLM Royal Dutch Airlines*, [2002] 2 A.C. 628, ¶ 71 (H.L. 2002).

[8] Dr. Hanson had the option of flying on a carrier that did not allow smoking on board. U.S. flag carriers, for example, did not allow smoking on board international flights at the time in question. Dr. Hanson chose instead to fly on an airline that necessarily exposed him to cigarette smoke. There is no evidence in the record below that he made any effort to change his travel plans once he learned on the original leg of his flight that Olympic allowed smoking on international flights.

condition on the aircraft leading to a passenger's death – fits squarely into the Saks line of cases.

Although the United States recognizes the validity of *Saks* and its progeny, *see* Br. of the United States at 16, the United States follows that recognition with the absurd suggestion that the carrier is liable under the Warsaw Convention when there is "death or bodily injury resulting from an airline's response to [a passenger's] medical condition." *Id.* at 17. As discussed above, that statement is not supported by the facts of this case. The United States apparently believes that the *Saks* line of cases simply do not apply when an airline fails to take action to prevent a passenger's pre-existing medical condition from developing into a medical emergency. It would turn the decision of this Court in *Saks* on its head to impose such duty and liability standards on an airline.[9]

As the Third Circuit held in a case that this Court cited with approval in *Saks*, "[i]n the absence of proof of abnormal external factors, aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an 'accident' within the meaning of Article 17." *Abramson v. Japan Airlines, Co., Ltd.*, 739

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[9] The United States is asking the Court to require airlines to undertake *a duty to prevent* passengers from becoming ill while on the flight, a duty that the Court expressly rejected in *Saks*. *See Saks*, 470 U.S. at 406-07 (holding that the "accident" inquiry focuses solely on the "nature of the event which caused the injury rather than the care taken by the airline to avert the injury"). The United States apparently would have all airlines give passengers detailed health questionnaires before they boarded the planes so that a passenger with a headcold is not seated near the engines to prevent illness caused by depressurization or that a passenger with a smoke allergy is not seated near the smoking section. Under the United States' position, whenever a passenger complains about smoke, the airline would have to undertake detailed questioning of the passenger to determine if the passenger merely dislikes the second-hand smoke or whether the passenger truly has a pre-existing medical condition.

F.2d 130, 132-33 (3d Cir. 1984) (cited in *Saks*, 470 U.S. at 404-05). In *Abramson*, the passenger claimed – as the plaintiffs did here – that the refusal to aid him was "unusual and unexpected" and thus an Article 17 accident. *Id.* at 132. The Third Circuit properly found that absent "proof of abnormal external factors, aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an 'accident' within the meaning of Article 17." *Id.* at 133. As this Court already held in *Saks*, the Third Circuit's decision in *Abramson* states the correct rule of law for air carrier liability under the facts of this case.

The United States' suggestion that the Warsaw Convention can be interpreted to impose an affirmative duty on airlines and their employees is directly contrary to a liability regime based upon "accidents." Such a duty would overturn the holding in *Saks* that the "accident" inquiry focuses solely on the "nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury." *Saks*, 470 U.S. at 406-07. The critical language of Article 17 from the Warsaw Convention – imposing air carrier liability only when there has been an "accident"– is being carried forward in the Montreal Convention. That language was written into this new Convention with the understanding that the *Saks* definition would carry forward. To change the definition and impose significant new duties on airlines at this critical stage would threaten the continued viability of the Warsaw Convention and acceptance of its successor, the Montreal Convention. The ATA urges the Court to rejected the unsupported interpretation offered by the United States.

CONCLUSION

The United States urges the Court to apply common law jurisprudence to the treaty-based legal regime of the Warsaw Convention. The Court should reject the United

Sttaes' invitation to expand the *Saks* definition of "accident" beyond recognizable form. The ATA urges the Court to reject the United States' invitation to completely rewrite the Warsaw Convention. The only decision here that retain the viability of *Tseng* and *Saks* and that honors the international agreement reached in the Warsaw Convention and the agreement that is about to be reached in the Montreal Convention, is to reverse the decision of the United States Court of Appeals for the Ninth Circuit below. To do so, the Court need do no more than affirm the continued viability of its decision in *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999), and *Air France v. Saks*, 470 U.S. 392 (1985). The Air Transport Association of America, Inc., as *amicus curiae*, urges the Court to do so.

Respectfully submitted,

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September 17, 2003

TO ALL COUNSEL OF RECORD

No. 03-40545 Blansett v. Cntntl Airlines Inc
USDC No. G-02-CV-61

The court advised that the above mentioned case will be held pending the Supreme Court's decision in Case No. 02-1348, Olympic Airways v. Husain, 316 F. 3d 829 (9th Cir. 2002) *cert. granted*, 123 S. Ct. 2215 (2003).

Sincerely,

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